CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

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U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

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DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

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U.S. Customs Service

Treasury Decisions

19 CFR Part 24

(T.D. 01–46)

RIN 1515–AC64

TIME LIMITATION FOR REQUESTING REFUNDS OF HARBOR MAINTENANCE FEES

AGENCY: Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to establish a one year time limit within which a refund request must be filed for overpayments of Harbor Maintenance Fees that were paid on a quarterly basis. The time limit will provide an efficient and reasonable final resolution of claims against Customs, including claims for refunds of export harbor maintenance fees that were held unconstitutional by the United States Supreme Court in 1998. Refund requests for harbor maintenance fee payments that are more than a year old must be filed by the effective date of this document.

EFFECTIVE DATE: December 31, 2001.

FOR FURTHER INFORMATION CONTACT: Deborah Thompson, Revenue Branch, National Finance Center (317) 298–1200 (ext. 4003).

SUPPLEMENTARY INFORMATION:

BACKGROUND

The Harbor Maintenance Fee was created by the Water Resources Development Act of 1986 (Pub. L. 99–622; codified at 26 U.S.C. 4461 *et seq.*) (the Act) and is implemented by § 24.24 of the Customs Regulations (19 CFR 24.24). Pursuant to the Act, the harbor maintenance fee became effective on April 1, 1987.

Imposition of the fee is intended to require those who benefit from the maintenance of U.S. ports and harbors to share in the cost of that maintenance. The fee has been assessed on port use associated with imports, exports, imported merchandise admitted into a foreign trade zone, pas-

sengers, and movements of cargo between domestic ports. Since April of 1998, based on the U.S. Supreme Court's decision that harbor maintenance fees applied to exports of merchandise are unconstitutional (*United States Shoe Corporation v. United States*, 118 S. Ct. 1290, No. 97–372 (March 31, 1998)), Customs has not collected export harbor maintenance fees. Currently, except for export shipments, the fee is assessed based on 0.125 percent of the value of commercial cargo loaded or unloaded at certain identified ports or, in the case of passengers, on the value of the actual charge paid for the transportation.

Notice of proposed rulemaking published on December 15, 2000

On December 15, 2000, Customs published a notice of proposed rulemaking (NPRM) in the Federal Register (65 FR 78430) proposing to amend § 24.24(e)(4) of the Customs Regulations (19 CFR 24.24(e)) to require the filing of a refund request for harbor maintenance fees paid on a quarterly basis within one year of the date of payment of the fee, except for fees paid relative to imported merchandise admitted into a foreign trade zone and subsequently withdrawn from the zone under 19 U.S.C. 1309, for which the refund request would have to be filed within one year of the date of withdrawal. The NPRM also proposed to amend § 24.73 of the Customs Regulations (19 CFR 24.73) to require the filing of general claims against Customs—those not otherwise provided for under the Customs laws—within one year of the act giving rise to the claim.

The NPRM sets forth the bases for proposing these time limits, including the Court of Appeals for the Federal Circuit's (CAFC) acknowledgement of Customs authority to impose a time limit on the filing of harbor maintenance fee refund requests (*Swisher International, Inc. v. United States*, 205 F. 3d 1358 (No. 99–1277 C.A.F.C. February 28, 2000), cert. denied). (In *Swisher*, the court held Customs denial of a request for a refund of export harbor maintenance fee payments to be a protestable decision under 19 U.S.C. 1514.)

The notice pointed out that for harbor maintenance fee payments that are more than a year old, a refund request would be required to be received by Customs prior to the effective date of the final rule adopting the proposal.

Interim regulation published on March 28, 2001

On March 28, 2001, Customs published an interim regulation in the Federal Register (66 FR 16854)(hereafter, Interim Regulation) amending § 24.24(e)(4) of the Customs Regulations, the same section of the regulations amended in this final rule document. The Interim Regulation, effective on the date of publication, amended the regulations to provide a new procedure for requesting refunds of export harbor maintenance fees. (On April 27, 2001, a correction to the Interim Regulation was published in the Federal Register (66 FR 21086).)

The main features of the new procedure are that: (1) most refund requests (those covering payments made on and after July 1, 1990) can be filed and processed without supporting documentation; and (2) export-

ers filing refund requests that require supporting documentation (covering payments made prior to July 1, 1990) will have an additional 120 days to submit documents or additional documents from the date Customs initially denies a request for lack of or insufficient documentation.

This final rule document incorporates the procedure set forth in the Interim Regulation. It is noted that pursuant to Customs consideration of the comments received in response to the NPRM (see discussion below), the effective date of the one year time limitation is 180 days from its date of publication in the Federal Register. This differs from the Interim Regulation's background discussion where it is stated that the effective date of the time limitation would be 30 days from date of publication.

DISCUSSION OF COMMENTS

Customs received 21 comments in response to the NPRM. The comments can be divided into five subject categories: (1) The proposed one-year filing requirement as applied to requests for refunds of export harbor maintenance fee payments made more than one year ago; (2) the applicability of the Regulatory Flexibility Act (5 U.S.C. 603 and 604) to the proposed amendment's one-year filing requirement as applied to export fee refund requests; (3) the documentary requirements; (4) the applicability of interest to refunds of export fees; and (5) requests for a public hearing/meeting.

Most of the comments were provided on behalf of exporters concerned about filing requests for refunds of export harbor maintenance fees that were held unconstitutional in 1998 and are no longer required under the Customs Regulations. These exporters have a keen interest in Customs procedure for issuing refunds of these fees. The Interim Regulation's procedure for obtaining refunds of these fees addresses and, Customs believes, resolves satisfactorily the issues raised by the comments, as discussed below.

Comments concerning the proposed amendment of § 24.73 to impose a one year filing requirement relative to general claims against Customs are not discussed in this document, as Customs has decided to delay proceeding with that proposed amendment.

The one-year filing requirement as applied to requests for refunds of export fee payments

Comment:

Eighteen of the 21 commenters objected to the proposed amendment's one-year filing requirement for refund requests of quarterly-paid harbor maintenance fees. Some commenters objected to imposition of any time limit, while most others objected to how Customs would apply the time limit to refund requests covering payments made more than one year ago.

The various formulations of this objection can be summarized as a complaint that the time limit as applied to payments that are more than one year old—which includes all export harbor maintenance fee pay-

ments—does not provide exporters enough time to file claims, and to the extent that lack of time results in exporters being unable to file refund requests, it is unreasonable and unfair. At least one commenter pointed out how some exporters might have to review up to ten or eleven years of payments to Customs dating back to 1987, a formidible task, especially when records that old are often stored off-site. Many companies routinely and reasonably destroy records that old. One commenter contended that many companies have not been dilatory, but genuinely lack the resources necessary to stay on top of this matter. Some companies have been waiting for litigation to be resolved and then for Customs to issue instructions for a refund filing procedure. These companies, say the commenters, will need more time to prepare their requests for refund than the proposed time limit allows.

Some commenters characterized this provision as a time limit that retroactively cuts off rightful claims contrary to the spirit and language of the *Swisher* decision. For this reason, some raised due process objections. Some raised equal protection objections on the grounds that equally situated exporters will be treated differently where some are able to file their claims timely (and are issued refunds) while others are not (and are not issued refunds). All of these commenters feel strongly that the fact that the export fees at issue were unconstitutional and thus wrongly collected weighs in favor of Customs exercise of leniency regarding a time limit. Some stated that for this reason (unconstitutionality/wrongful collection), Customs should be assisting exporters to obtain refunds, not impeding them.

Many commenters believe that requiring refund requests for payments made more than a year ago by the effective date of the final rule would not be workable and would not be fair. (These comments indicate that most commenters contemplated a short period of delay between the publication date and the effective date. The usual delay period is 30 days. At least two commenters contemplated that the effective date would be the date of publication.) Some commenters suggested that this short deadline will result in a flood of claims that will be an inconvenience and distraction for Customs, will require much time to process, and will result in a "hurry up and wait" situation.

At least one commenter suggested that the effective date of the final rule should be delayed 60 days. Some commenters stated that there should not be a deadline for payments ruled unconstitutional. At least seven commenters recommended that, as applied to payments older than one year, filers should have one full year from the date of publication of the final rule to file refund requests. Another commenter recommended that exporters should have eighteen months from the date of publication to file refund requests.

Customs response:

Customs believes that a one year filing requirement is reasonable. Customs statutory and regulatory provisions that impose time limits generally do not provide more than a year to take whatever action is re-

quired under the provision. In fact, similar or shorter time limits exist in other contexts, such as the requirement to file a protest under 19 U.S.C. 1514 within 90 days of a Customs decision regarding the amount of duties chargeable, the amount of a charge or exaction, or the liquidation of an entry. The protest procedure is the basic procedure for challenging a variety of Customs decisions and obtaining a refund of overpaid duties or charges. It is noteworthy that the applicable Customs law grants no more than 90 days to take this important action. The requirement to file a petition for reliquidation to correct a clerical error under 19 U.S.C. 1520(c)(1) within one year of the date of liquidation is another example. A third example is the one year filing requirement of 19 U.S.C. 1520(d) imposed on requests for reliquidation of an entry involving goods qualifying under NAFTA rules of origin. The matter of requesting a refund of overpaid harbor maintenance fees is no more important than the matters these provisions address.

Generally, the process of obtaining refunds of harbor maintenance fees is well served by allowing up to one year to file the request/claim. It balances Customs legitimate need for efficient and final resolution of claims with the legitimate interest of exporters seeking to reclaim fees that should not have been paid or were paid in excess of what was due. Moreover, the CAFC in *Swisher* explicitly stated that Customs is "free to alter the regulation to impose a time limit." Thus, in imposing this one year time limit, Customs is simply acting on the Court's suggestion, in addition to seeking to bring more order and reasonable finality to the refund procedure.

Regarding application of the time limit to export fee payments (or other quarterly harbor maintenance fee payments) that were made more than a year ago (as is the case with all export fee payments), Customs does not agree with the contention that it is unfair and unreasonable to require filing of the refund request by the effective date of the final rule.

The notion that exporters will be confined to only a short period between publication of the final rule and its effective date to file refund requests is simply inaccurate. Customs notes that the regulation authorizing a refund request was promulgated in 1991. Thus, exporters have had 10 years to file refund requests. As far back as 1995 when the fee as applied to exports was initially found to be unconstitutional by the U.S. Court of International Trade (CIT) in *U.S. Shoe Corp. v. United States*, 19 CIT 1284, 907 F. Supp. 408 (CIT 1995), exporters were on notice of their ability to recover these fees. That was six years ago. The regulation authorizing refund requests had been effective for four years by that time. While the *U.S. Shoe* case was appealed and was not affirmed by the Supreme Court until its 1998 decision, exporters who paid export fees were on notice during that three year period that they may be entitled to a refund. Nothing prevented exporters from filing refund requests under the existing regulations at any time during that period and many exporters did so. Neither were exporters precluded from fil-

ing refund requests during the period following the Supreme Court's conclusive ruling in 1998, and many did so.

Since February of 2000, when the court in *Swisher* stated that it had jurisdiction to review a refund request denial if properly protested within 90 days of the denial, over 130 exporters followed these procedures, making it clear that they were available to all exporters. In December of 2000, the NPRM gave exporters notice regarding the proposed change to the Customs regulations to impose a one year time limit within which to file a refund request. This was the fourth in a series of public actions (by the courts and Customs) over a five year period that served as notice to exporters that refunds of export harbor maintenance fees were obtainable. By the time the NPRM's proposed amendment is published as a final rule, exporters will have had another four to five months since publication of the NPRM to file timely refund requests.

Nevertheless, while Customs believes that requiring the filing of export fee refund requests by the effective date of the final rule is not unfair or unreasonable, Customs acknowledges the validity of sentiments expressed by those commenters who believe that more time to file refund requests furthers the interest held by those who have not yet requested refunds on fees paid more than a year ago. Customs intent at the time it issued the NPRM and, indeed, at the time it issued the Interim Regulation (regarding the amended procedure for filing refund requests) was to make the one year time limitation effective on the usual effective date of a final rule, 30 days from the date of its publication in the Federal Register. Based on the commenters' concerns, Customs is delaying the effective date of this final rule document to the date that is 180 days after publication. This extends by 150 days the time within which refund requests for export fees (and other quarterly harbor maintenance fees) paid over a year ago can be filed, as compared to the 30 day effective period contemplated by Customs at the time the NPRM was published and as set forth in the background discussion of the Interim Regulation.

With a delayed effective date of 180 days, exporters will have had approximately 12 months from the date of publication of the NPRM to file refund requests. As of the date of publication of this final rule document, over 2000 exporters have already filed refund requests since publication of the NPRM.

Given all of the above considerations, including the extended delayed effective date, Customs believes that exporters have had, and still have, ample time to file a refund request.

In regard to comments that the proposed amendment's time limit is retroactive, particularly with respect to payments made more than a year ago, Customs notes that an NPRM, by its very nature, is prospective, not retroactive. The amendments it proposes will become effective only upon later publication of a final rule which itself will become effective prospectively (usually not until at least 30 days after its publication but, as above, 180 days for this final rule document). Customs

therefore disagrees that the time limit at issue is retroactive. The fact that it does not retroactively cut off claims is evidenced by the more than 2000 exporters who have filed refund requests since the NPRM was published and by the additional numbers of exporters who surely will file timely refund requests after publication of this final rule document.

As for the comment that some exporters were waiting to see events transpire before filing a refund request, Customs again notes that the procedure for filing refund requests has been provided for under the Customs Regulations for a decade. Any of these exporters could have filed refund requests at any time. Exporters who waited may have done so at their own peril, but they still will have time to file a timely refund request. Again, this final rule is not effective until 180 days after publication, and the procedure set forth in the Interim Regulation is less burdensome than the procedure it replaced. The procedure set forth in the Interim Regulation provides a simpler process and more time to perfect a refund request than was made apparent in the NPRM. It provides that exporters filing for refunds of payments made on or after July 1, 1990, need only file a letter of request containing certain information, and those who are required to submit supporting documentation (proof of payment) with their requests for refund (relative to payments made prior to July 1, 1990) will have an additional 120-day period to file additional documentation if a timely filed request is denied for lack of or insufficient documentation.

Based on the foregoing, Customs believes that the time limit as applied to payments made more than a year ago, as set forth in this final rule document, is fair, reasonable, and eminently capable of being complied with under the amended refund request procedure. Customs believes that the time limit makes the refund regulation more consistent with other Customs laws and regulations governing refunds, while still affording quarterly payors ample opportunity to file refund requests. In imposing this time limit that brings more order, efficiency, and measured finality to the process, Customs believes it is acting reasonably and responsibly in furtherance of its mission to administer the law.

Comments regarding applicability of the Regulatory Flexibility Act

Comment:

Three commenters asserted that the one-year filing requirement as proposed in the NPRM will have a significant impact on small business entities whose rightful claims may be cut off by the short deadline (relative to payments made more than a year ago). These commenters thus contended that Customs must perform an analysis under the Regulatory Flexibility Act (RFA).

Customs response:

The RFA (or Act) requires that an agency perform an analysis when that agency's regulatory action will have a significant economic impact on a substantial number of small entities. Customs does not believe that

its action (in amending the regulations to impose a one year filing requirement and require, for payments that are more than one year old, the filing of requests by the effective date of this final rule document) will produce an impact that falls within the purview of the Act. More specifically, Customs believes that the potential impact complained of (failure to file a timely refund request by the effective date of this final rule) will not result from its action but from the inaction of exporters or others eligible to file for refunds.

The potential impact complained of is capable of being avoided without significant inconvenience or difficulty. There is no reason why an exporter should be unable to file a refund request by what Customs believes is a reasonable deadline. Numerous refund requests have been filed already since publication of the NPRM on December 15, 2000, and many were filed even before the NPRM's publication. By the effective date of this final rule, exporters will have had at least twelve months to file a request for a refund since publication of the NPRM. This period is in addition to the one year exporters have had to file refund requests since the CAFC's decision in *Swisher* in February of 2000, the three years exporters have had to file requests since the Supreme Court's 1998 decision in *U.S. Shoe*, and the six years they have had to file requests since the initial holding of unconstitutionality by the CIT in its 1995 *U.S. Shoe* decision.

Moreover, an exporter wishing to secure its claim under the instant time limit and the Interim Regulation's procedure need only file a letter of request prior to the effective date of this final rule, as prescribed under the Interim Regulation. Supporting documentation will not be required in most cases, and where it is required (for payments made prior to July 1, 1990), exporters will have an additional 120 days to produce that documentation after an initial claim is denied for lack of or insufficient documentation. For these reasons, Customs believes that an impact of the kind that triggers an analysis under the RFA will not result from its action in imposing the regulatory filing requirement at issue.

Comments concerning documentary requirements

Comment:

Many commenters objected to the requirement in the NPRM that a CF 349 be filed with requests for refunds. These commenters pointed out that Customs accepted other documents with fee payments before the regulations required use of the CF 349 sometime in 1991. Some stated that Customs accepted payments and issued refunds without CF 349s even after 1991. According to these commenters, these other documents include the Vessel Export Summary Sheet (with payment), cancelled checks (as proof of payment), and other documents (for both purposes) from time to time. These commenters urge Customs to amend the regulation to permit alternative documentation that reasonably establishes payment of the fee.

One commenter recommended that Customs allow submission of reconstructed CF 349s. Many commenters stated that Customs should

not make a determination on any refund request where the exporter has a FOIA request pending. Some suggested that the amended regulation should provide that an exporter can file a refund request within 60 days (or some other period of time) after its receipt of a FOIA response. Other commenters recommended that Customs delay a refund determination on a timely filed refund request until the exporter receives a response to the FOIA request and is given time to supplement the refund request with the documentation received.

Customs response:

These comments were received before the Interim Regulation was published simplifying the procedure for filing refund requests. The Interim Regulation was published because Customs agrees with the general tenor of these comments that there should exist a more expeditious and streamlined procedure for requesting an export harbor maintenance fee refund and because Customs understands the difficulty some exporters face in providing supporting documentation with the refund request. Under the Interim Regulation, an exporter requesting a refund of export fees need not provide supporting documentation, such as the CF 349 or the Export Vessel Movement Summary Sheet, for any quarter from July 1990 forward (through April of 1998 when collection of export fees ceased). Customs has relieved these exporters from this burden because Customs has retained documentation relative to payments made during this period. Since Customs possesses this documentation, exporters need not file it.

In doing this (relieving exporters from the documentary requirement), Customs removed the 10-year-old regulatory requirement that refund requests include supporting documentation. Under the Interim Regulation procedure, if there is a dispute as to any quarter from July 1990 forward, the exporter must then submit supporting documentation for Customs review and consideration. This new procedure effectively addresses the concerns exporters raised about FOIA requests, as it eliminates any need to obtain supporting documentation through a FOIA request for payments made after July of 1990. Documents that might be obtained through a FOIA request are not necessary to obtain a refund. Customs will apply the new procedure to all previously filed refund requests regardless of whether they included supporting documentation.

With regard to the quarters preceding July of 1990, the Interim Regulation did not amend the 10-year-old refund request procedure because Customs has not retained copies of supporting documentation for payments made during this period. Thus, exporters must submit supporting documentation with refund requests for any quarter preceding July of 1990. The fact that Customs does not possess pre-July 1990 documentation effectively eliminates any legitimate reason to link a FOIA request with a refund request; that is, since Customs does not possess and cannot provide copies of the supporting documentation requested, a FOIA request would be fruitless.

Regarding the points made by some commenters concerning the documents, Customs acknowledges that the CF 349 was not required until 1991. Prior to use of the CF 349, Customs required a certified Export Vessel Movement Summary Sheet or, if the exporter filed automated summary monthly Shippers Export Declarations, a letter containing the following information: the exporter's identification, its EIN, the appropriate Census Bureau reporting symbol, and the quarter involved. Since the Interim Regulation continues to provide that copies of supporting documentation must accompany refund requests for quarters preceding July of 1990, failure to submit this documentation will result in the denial of the refund request. However, under the Interim Regulation's procedure, an exporter, whose refund request (covering pre-July 1, 1990, payments) is denied for lack of or insufficient documentation, will have an additional 120 days from the date of denial to submit documentation or additional documentation to support its claim. Again, Customs believes that the procedure provided for in the Interim Regulation addresses and resolves the commenters concerns regarding documentation requirements and FOIA requests.

Comments regarding payment of interest on export harbor maintenance fee refunds

Comment:

Three commenters urged Customs to apply interest to export harbor maintenance fee refunds. One commenter stated that the court in *Swisher* ordered that Customs pay interest on refunds issued under the court-imposed procedure (applicable to only those who filed complaints with the court). This commenter contended that Customs administrative procedure should be consistent with the court's intentions and provide for the payment of interest.

Customs response:

Customs disagrees with the commenters who called for the payment of interest on administrative refunds of export harbor maintenance fee payments. The CAFC ruled in *International Business Machines Corp. v. United States*, 205 F. 3d 1367 (Fed. Cir. 2000) (hereafter, *IBM*), a test case designated to resolve all export fee interest issues, that exporters are not entitled to interest on the refund of these fees. The court opined that there is no statutory waiver of sovereign immunity which would allow the United States to pay interest on adminstrative refunds. IBM attempted to appeal this ruling to the United States Supreme Court, but the Supreme Court refused to hear the case (*IBM v. United States*, cert. denied, 69 U.S.L.W. 3259 (Feb. 20, 2001)).

In the meantime, several exporters have filed lawsuits in the CIT arguing that interest should be paid on adminstrative refunds of export fees on grounds they claim were not considered by the CAFC in *IBM*. Unless there is a final ruling awarding interest in these lawsuits, or in any test case designated by the CIT to resolve this issue, Customs will

abide by the ruling in *IBM* that bars the payment of interest on adminstrative refunds of export fees.

In addition, it should be noted that, as in *Swisher*, post-judgment interest is paid in lawsuits where a request for export fee refunds was denied by Customs, a protest was filed and denied, and a lawsuit was commenced under 28 U.S.C. 1581(a). However, this payment of post-judgment interest, which is statutorily mandated, does not apply to adminstrative refunds of export fees.

Comment:

Six commenters stated that Customs should hold a public hearing or meeting on the proposed amendment. These commenters alleged that the short deadline for filing refund requests for payments that are more than a year old will have a significant and harmful impact on small business entities. Thus, a public meeting or hearing would be appropriate to consider applicability of the provisions of the RFA and to discuss the time limit proposed and its effect on the capability of exporters to meet the deadline and submit required documentation.

Customs response:

Customs believes that a public hearing or meeting is not necessary because the issues raised in the comments as reasons for the meeting have been addressed and resolved by Customs since publication of the NPRM. More specifically, Customs believes that the following provisions, which were not included in the NPRM, will satisfactorily resolve the commenters' concerns: (1) this final rule document's delayed effective date, which will extend the date by which refund requests for payments made more than a year ago must be filed to 180 days from the date of publication in the Federal Register (as opposed to 30 days after publication, as indicated in the Interim Regulation); (2) the Interim Regulation's provision that exporters need not file supporting documentation with refund requests for payments made on and after July 1, 1990; and (3) the Interim Regulation's provision of an additional 120 days for filing supporting documentation where supporting documentation is required.

As these provisions change the circumstances contemplated by the commenters who suggested a public meeting, and since Customs believes they put to rest the commenters' concerns, Customs believes that a public meeting is not necessary.

CONCLUSION

After analysis of the comments and further review and consideration of the matter, Customs has determined to adopt as final the amendment proposed in the NPRM published in the Federal Register (65 FR 78430) on December 15, 2000, setting forth in § 24.24(e)(4) the one year time limitation on requesting refunds of quarterly-paid harbor maintenance fees. It is noted that because Customs has issued the Interim Regulation that amended § 24.24(e)(4) to simplify the procedures for requesting refunds of export harbor maintenance fees, after publication of the

NPRM, the structure of § 24.24(e)(4) is revised from how it is set forth in the NPRM to reflect the substance of the Interim Regulation.

Customs notes that the text of the amended regulation does not explicitly set forth that refund requests for export fee payments that were made more than a year ago must be filed by the effective date of this final rule document. It only sets forth the one-year-from-payment filing requirement (with the aforementioned exception for foreign trade zone withdrawals). Customs therefore emphasizes that export fee refund requests for payments made more than a year ago that are not filed on or before the effective date of this final rule will be rejected as untimely. After a reasonable time, the regulation will be amended to delete the provision concerning refunds of export harbor maintenance fees, as these fees are no longer collected by Customs (and haven't been since April of 1998).

Regarding the other proposed changes in the NPRM, the technical change proposed to § 24.24(e)(2)(ii) is adopted as proposed. As mentioned in the comment discussion, Customs has determined not to proceed at this time with the proposed amendment to § 24.73 imposing a one year filing requirement on general claims.

PAPERWORK REDUCTION ACT

The collection of information contained in this regulation has previously been reviewed and approved by the Office of Management and Budget (OMB) under OMB control number 1515–0158. This rule does not include any changes to the existing approved information collection.

REGULATORY FLEXIBILITY ACT

Insofar as this amendment to the regulations merely adds a reasonable time limit within which to file for an already provided for Customs procedure under an existing regulation, pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that this amendment will not have a significant economic impact on a substantial number of small entities. Accordingly, the amendment is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

EXECUTIVE ORDER 12866

This document does not meet the criteria for a "significant regulatory action" as specified in E.O. 12866.

DRAFTING INFORMATION

The principal author of this document was Bill Conrad, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices contributed in its development.

LIST OF SUBJECTS

19 CFR Part 24

Accounting, Claims, Customs duties and inspection, Fees, Financial and accounting procedures, Harbors, Imports, Reporting and recordkeeping requirements, Taxes, User fees.

AMENDMENTS TO THE REGULATIONS

For the reasons stated in the preamble, Part 24 of the Customs Regulations (19 CFR Parts 24) is amended as follows:

PART 24—CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

1. The authority citation for part 24 continues to read in part as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58a–58c, 66, 1202 (General Note 22, Harmonized Tariff Schedule of the United States), 1505, 1624; 26 U.S.C. 4461, 4462; 31 U.S.C. 9701.

* * * * * * *

2. Section 24.24 is amended by revising the heading of paragraph (e), removing in paragraph (e)(2)(ii) the reference to "(e)(3)(iii)" and adding in its place "(e)(2)(iii)", and revising paragraph (e)(4) to read as follows:

§ 24.24 Harbor Maintenance Fee.

* * * * * * *

(e) *Collections, supplemental payments, and refunds*— * * *

(4) *Refunds and supplemental payments*—(i) *General*. To make supplemental payments or seek refunds of harbor maintenance fees paid relative to the unloading of imported cargo, the procedures applicable to supplemental payments or refunds of ordinary duties must be followed. To seek refunds of quarterly-paid harbor maintenance fees pertaining to export movements, the procedures set forth in paragraph (e)(4)(iv) of this section must be followed. To make supplemental payments on any quarterly-paid harbor maintenance fee or seek refunds of quarterly-paid harbor maintenance fees pertaining to other than export movements, the procedures set forth in paragraph (e)(4)(iii) must be followed. The address to mail supplemental payments of quarterly-paid harbor maintenance fees is: U.S. Customs Service, P.O. Box 70915, Chicago, Illinois 60673–0915. The address to mail requests for refunds of quarterly-paid harbor maintenance fees is: U.S. Customs Service, HMT Refunds, 6026 Lakeside Blvd., Indianapolis, IN, 46278.

(ii) *Time limit for refund requests*. A refund request must be received by Customs within one year of the date the fee for which the refund is sought was paid to Customs or, in the case of fees paid relative to imported merchandise admitted into a foreign trade zone and subsequently withdrawn from the zone under 19 U.S.C. 1309, within one year of the date of withdrawal from the zone.

(iii) *For fees paid on other than export movements*. If a supplemental payment is made for any quarterly-paid harbor maintenance fee or a refund is requested relative to quarterly fee payments previously made regarding the loading or unloading of domestic cargo, the unloading of cargo destined for admission into a foreign trade zone, or the boarding or disembarking of passengers, the refund request or supplemental payment must be accompanied by a Harbor Maintenance Fee Amended Quarterly Summary Report, Customs Form 350, along with a copy of the Harbor Maintenance Fee Quarterly Summary Report, Customs Form 349, for the quarter(s) covering the payment to which the refund request or supplemental payment relates. A request for a refund must specify the grounds for the refund.

(iv) *For fees paid on export movements*. Customs will process refund requests relative to fee payments previously made regarding the loading of cargo for export as follows:

(A) For export fee payments made prior to July 1, 1990, the exporter (the name that appears on the SED or equivalent documentation authorized under 15 CFR 30.39(b)) or its agent must submit a letter of request for a refund specifying the grounds for the refund and identifying the specific payments made. The letter must be accompanied by proof of payment then required under the regulations relative to each payment claimed. Proof of payment can be either a copy of the Export Vessel Movement Summary Sheet or, where an Automated Summary Monthly Shipper's Export Declaration was filed, a letter containing the exporter's identification, its employer identification number (EIN), the Census Bureau reporting symbol, and the quarter for which the payment was made. Upon receiving a letter of request for a refund, Customs will evaluate the supporting documentation submitted and issue the refund to the exporter or its agent if warranted. If the request lacks documentation or the documentation submitted is insufficient, the exporter's refund request will be denied, in which case the exporter will have an additional 120 days from the date of denial to submit documentation or additional documentation. If the documentation submitted during the 120 day period is insufficient, Customs will deny the request.

(B) For export fee payments made on or after July 1, 1990, the exporter or its agent must submit a letter of request for a refund specifying the grounds for the refund, identifying the quarters for which a refund is sought, and containing the following additional information: the exporter's name, address, and employer identification number (EIN); the name and EIN of any freight forwarder or other agent that made export fee payments on the exporter's behalf; and a name, telephone number, and facsimile number of a contact person. If a refund request is filed by a freight forwarder or other agent on the exporter's behalf, the request must include a properly executed power of attorney and/or a letter signed by the exporter authorizing the representation. Refund requests for payments made on or after July 1, 1990, need not be accompanied by supporting documentation. Upon receipt of the letter of request, Cus-

toms will search its records for export fee payments made by or on behalf of the requesting exporter during the quarters identified in the letter of request. Customs will then mail to the exporter or its agent a "Harbor Maintenance Fee Refund Report and Certification" (Report/Certification) containing the results of the search and a statement of the amount of refunds owed to the exporter, if any. If the exporter agrees with the information in the Report/Certification, the exporter must sign the Report/Certification and submit it to Customs with a letter containing an address for mailing the refund. The Report/Certification must be signed by an officer of the company duly authorized to bind the company, or an agent (such as a broker or freight forwarder) authorized to sign the document under a properly executed power of attorney or a letter signed by an authorized officer of the company. Upon receipt of the signed Report/Certification, Customs will issue the refund. If the exporter disagrees with the information in the Report/Certification, the exporter must submit a letter explaining its claim along with proof of payment, either a copy of a Harbor Maintenance Fee Quarterly Summary Report, Customs Form 349, for the quarter(s) covering the refund requested or, if applicable, a copy of an Export Vessel Movement Summary Sheet or, where an Automated Summary Monthly Shipper's Export Declaration was filed, a letter containing the exporter's identification, its employer identification number (EIN), the Census Bureau reporting symbol, and the quarter for which the payment was made. Upon receiving the letter and documentation, Customs will conduct a second review and will either confirm the exporter's claim and mail a revised Report/Certification to the exporter or its agent, or notify the exporter or its agent that confirmation cannot be made. In the latter instance, the Report/Certification will not be revised. Upon receipt of a properly signed Report/Certification (initial or revised), Customs will issue the refund. The signed Report/Certification received by Customs constitutes the exporter's agreement that Customs payment of the refund amount determined to be owed in the Report/Certification is in full accord and satisfaction of all export fee refund claims. The signed Report/Certification also represents the exporter's release, waiver, and abandonment of all claims against the Government, its officers, agents, and assigns for costs, attorney fees, expenses, compensatory damages, and exemplary damages. Upon receipt of the signed Report/Certification, Customs releases, waives, and abandons all claims other than fraud against the exporter, its officers, agents, or employees arising out of all export fee payments.

* * * * * * *

CHARLES W. WINWOOD,
Acting Commissioner of Customs.

Approved: May 18, 2001.

TIMOTHY E. SKUD,
Acting Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, July 2, 2001 (66 FR 34813)]

U.S. Customs Service

General Notices

QUARTERLY IRS INTEREST RATES USED IN CALCULATING INTEREST ON OVERDUE ACCOUNTS AND REFUNDS ON CUSTOMS DUTIES

AGENCY: Customs Service, Treasury.

ACTION: General notice.

SUMMARY: This notice advises the public of the quarterly Internal Revenue Service interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of Customs duties. For the quarter beginning July 1, 2001, the interest rates for overpayments will be 6 percent for corporations and 7 percent for non-corporations, and the interest rate for underpayments will be 7 percent. This notice is published for the convenience of the importing public and Customs personnel.

EFFECTIVE DATE: July 1, 2001.

FOR FURTHER INFORMATION CONTACT: Ronald Wyman, Accounting Services Division, Accounts Receivable Group, 6026 Lakeside Boulevard, Indianapolis, Indiana 46278, (317) 298–1200, extension 1349.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to 19 U.S.C. 1505 and Treasury Decision 85–93, published in the Federal Register on May 29, 1985 (50 FR 21832), the interest rate paid on applicable overpayments or underpayments of Customs duties shall be in accordance with the Internal Revenue Code rate established under 26 U.S.C. 6621 and 6622. Section 6621 was amended (at paragraph (a)(1)(B) by the Internal Revenue Service Restructuring and Reform Act of 1998, Pub.L. 105–206, 112 Stat. 685) to provide different interest rates applicable to overpayments: one for corporations and one for non-corporations.

The interest rates are based on the short-term Federal rate and determined by the Internal Revenue Service (IRS) on behalf of the Secretary of the Treasury on a quarterly basis. The rates effective for a quarter are determined during the first-month period of the previous quarter.

In Revenue Ruling 2001–32 (*see*, 2001–26 IRB 1, dated June 25, 2001), the IRS determined the rates of interest for the fourth quarter of fiscal year (FY) 2001 (the period of July 1—September 30, 2001). The interest rate paid to the Treasury for underpayments will be the short-term Federal rate (4%) plus three percentage points (3%) for a total of seven percent (7%). For corporate overpayments, the rate is the Federal short-term rate (4%) plus two percentage points (2%) for a total of six percent (6%). For overpayments made by non-corporations, the rate is the Federal short-term rate (4%) plus three percentage points (3%) for a total of seven percent (7%). These interest rates are subject to change the first quarter of FY–2002 (the period of October 1—December 31, 2001).

For the convenience of the importing public and Customs personnel the following list of IRS interest rates used, covering the period from before July of 1974 to date, to calculate interest on overdue accounts and refunds of Customs duties, is published in summary format.

Beginning Date	*Ending Date*	*Under-payments (percent)*	*Over-payments (percent)*	*Corporate Overpayments (Eff. 1–1–99) (percent)*
Prior to				
070174	063075	6 %	6 %	
070175	013176	9 %	9 %	
020176	013178	7 %	7 %	
020178	013180	6 %	6 %	
020180	013182	12 %	12 %	
020182	123182	20 %	20 %	
010183	063083	16 %	16 %	
070183	123184	11 %	11 %	
010185	063085	13 %	13 %	
070185	123185	11 %	11 %	
010186	063086	10 %	10 %	
070186	123186	9 %	9 %	
010187	093087	9 %	8 %	
100187	123187	10 %	9 %	
010188	033188	11 %	10 %	
040188	093088	10 %	9 %	
100188	033189	11 %	10 %	
040189	093089	12 %	11 %	
100189	033191	11 %	10 %	
040191	123191	10 %	9 %	
010192	033192	9 %	8 %	
040192	093092	8 %	7 %	
100192	063094	7 %	6 %	
070194	093094	8 %	7 %	
100194	033195	9 %	8 %	
040195	063095	10 %	9 %	
070195	033196	9 %	8 %	
040196	063096	8 %	7 %	
070196	033198	9 %	8 %	
040198	123198	8 %	7 %	
010199	033199	7 %	7 %	6 %

Beginning Date	*Ending Date*	*Under-payments (percent)*	*Over-payments (percent)*	*Corporate Overpayments (Eff. 1–1–99) (percent)*
040199	033100	8 %	8 %	7 %
040100	033101	9 %	9 %	8 %
040101	063001	8 %	8 %	7 %
070101	093001	7 %	7 %	6 %

Dated: June 27, 2001.

CHARLES W. WINWOOD,
Acting Commissioner of Customs.

[Published in the Federal Register, July 2, 2001 (66 FR 34988)]

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, June 27, 2001.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

REVOCATION OF CUSTOMS RULING LETTER & TREATMENT RELATING TO TARIFF CLASSIFICATION OF A CHILD'S BACKPACK WITH ATTACHED "DOLL CARRIER"

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter and treatment relating to the classification of a child's backpack.

SUMMARY: Pursuant to Section 625(c), Tariff Act of 1930, as amended, (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling letter pertaining to the tariff classification of a child's backpack with doll carrier. Customs also intends to revoke any treatment previously accorded by Customs to substantially identical transactions. Notice of proposed revocation was published in the CUSTOMS BULLETIN of May 16, 2001, Vol. 35, No. 20. No comments were received.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after September 10, 2001.

FOR FURTHER INFORMATION CONTACT: Mary Beth Goodman, Textile Branch, (202) 927–1679.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective.

Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. § 1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, a notice was published on May 16, 2001, in the CUSTOMS BULLETIN, Volume 35, Number 12, proposing to revoke New York Ruling Letter F87328, dated June 12, 2000, pertaining to the classification of a child's backpack with attached doll carrier from China under the Harmonized Tariff Schedule of the Untied States (HTSUS). No comments were received.

In NY F87328, dated June 12, 2000, concerning the tariff classification of a child's backpack designed to carry a toy doll, the product was erroneously classified under subheading 4202.22.4500 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) as a handbag of cotton. The item under review is not a handbag but rather is a child's backpack which is fitted with a "seat" in which a toy doll is carried, and therefore the classification in subheading 4202.22.4500, HTSUSA is inappropriate. The correct classification for the product should be under subheading 4202.92.1500, HTSUSA, as a backpack.

Customs, pursuant to 19 U.S.C. 1625(c)(1), is revoking NY F87328, and any other ruling not specifically identified on identical or substantially similar merchandise to reflect the proper classification within the HTSUSA pursuant to the analysis set forth in Proposed Headquarter Ruling (HQ) 964488 (*see* "Attachment" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by Customs to substantially identical merchandise.

Although in this notice Customs is specifically referring to one ruling, New York (NY) F87328, this notice covers any rulings relating to the specific issue(s) of tariff classification set forth in NY F87328, which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling

letter, internal advice, memorandum or decision or protest review decision) on the issue(s) subject to this notice, should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical merchandise. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations involving the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule. Any person involved in substantially identical transactions should advise Customs during this notice and comment period. An importer's failure to advise Customs of substantially identical merchandise or of a specific ruling not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of the final decision of this notice.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: June 20, 2001.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, June 20, 2001.

CLA–2 RR:CR:TE 964488 mbg
Category: Classification
Tariff No. 4202.92.1500

JANET A. FOREST, ESQ.
MILLER & CHEVALIR
655 15th St. N.W.
Washington, DC 20005

Re: Classification of child's backpack with doll carrier; Revocation of NY F87328.

DEAR MS. FOREST:

On September 7, 2000, you requested reconsideration of New York ruling letter ("NY") F87328, dated June 12, 2000, on the classification of merchandise described as a child's "baby doll carrier" which was originally classified in subheading 4202.22.4500 as a handbag under the Harmonized Tariff Schedule of the United States Annotated ("HTSUSA"). A sample was submitted with your request which will be retained by Customs. Upon review, Customs has determined that the subject merchandise is not a toy under heading 9503,

HTSUSA, and was properly classified in NY F87328 under heading 4202, HTSUSA, although not in the appropriate subheading, as explained below.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), a notice was published on May 16, 2001, in Vol. 35, No. 20 of the CUSTOMS BULLETIN, proposing to revoke NY F87328 and to revoke the treatment pertaining to the classification of a child's backpack with doll carrier. No comments were received in response to this notice.

Facts:

The subject merchandise is described as a "baby doll carrier," and is called a "Bitty Baby Carrier" in the catalog which was subsequently submitted to Customs. The style number for the subject merchandise is identified inconsistently by Pleasant Company and this ruling applies to style(s) BBDC–01, BBBC and B0057. The merchandise, which is intended for children, is a backpack fitted with an "infant carrier" for a doll on the exterior. The "infant carrier" is sewn onto the outer pocket of the backpack and resembles a cloth "seat" in which the child is supposed to place a small doll. The backpack is manufactured with an exterior surface of 100 percent cotton printed fabric. The top of the bag is secured by means of a zippered closure. The bag measures approximately 12 inches by 9½ inches by 3 inches.

Issue:

What is the proper classification of the subject merchandise under the HTSUSA?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation ("GRIs"). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80.

The competing provisions in this case are heading 4202, HTSUSA, which provides for, *inter alia*, handbags and backpacks, and heading 9503, HTSUSA, which provides for other toys.

Customs has ruled on similar items in the past. Those decisions have been consistent in determining that a crucial factor for classification purposes is the function of the article in question. That is to say, does the role of the submitted sample function as a handbag, backpack or as a toy?

In HQ 950752, dated January 9, 1992, classifying a stuffed toy with a backpack feature, Customs ruled:

> Although the whimsical characters are designed to appeal to children, the presence of a functional compartment, shoulder straps and hook and loop closures indicate an intent for use as a carrying case, a use which characterizes the article at issue. The compartment which forms the animal body is functionally relevant and capable of use by a small child for the storing of small toys or supplies. Despite the proportions of this item, it is nonetheless recognizable as a backpack—the detachable shoulder straps do not detract from the items' carrying ability, since conventional backpacks also have straps which may be adjusted or removed * * * We therefore find that heading 9503 does not adequately provide for the present merchandise and may not be classified therein.

See also, HQ 081729, dated February 16, 1990

Similarly, HQ 087792, dated December 18, 1990, in classifying novelty "pumpkin" and "reindeer" handbags, stated:

> The only absolute requirement of a handbag is that it be held in the hand or hung by an arm/shoulder strap. This is true of the merchandise at issue. The size and sturdiness of these bags is more than sufficient for daily transport of personal effects. * * * It is true that the novel design will attract the consumer's attention to the article; it is our determination, however, that the utilitarian function of these items will provide the primary sales appeal and use of the product.

Analysis similar to the aforementioned Headquarters Rulings regarding handbags is appropriate for the submitted sample. It is essentially a novelty bag within which a child can place personal effects with a doll placed on the outside of the backpack. Though it is true that the features of the article are specifically designed to appeal to a child, it is the use of the article, i.e., as a carrying bag, which characterizes the article. Backpacks, regardless of size or intended purpose, are *eo nomine* provided for within subheading 4202, HTSUSA. Therefore, Customs finds the article was properly classified in heading 4202, HTSUSA, which provides *inter alia*, for backpacks.

However upon review, Customs has determined that the Baby Doll Carrier was erroneously classified due to an error which occurred in the classification of the subject merchandise at the subheading level. In NY F87328, the merchandise was classified as a handbag in subheading 4202.22.4500, HTSUSA. Customs believes that the subject merchandise is properly classified in subheading 4202.92.1500, HTSUSA, which provides for travel, sports and similar bags, including backpacks. The merchandise has adjustable straps on the back side of the bag and is designed for the child to wear on her back. It also has the dimensional size and carrying capacity characteristic of a child's backpack and should be properly classified as such.

Holding:

NY F87328, dated June 12, 2000, is hereby revoked.

The subject merchandise is properly classified in subheading 4202.92.1500, HTSUSA as "Trunks, suitcases, vanity-cases, attaché cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder boxes, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper: Other: With outer surface of sheeting of plastic or of textile materials: Travel, sports and similar bags: With outer surface of textile materials: Of vegetable fibers and not of pile or tuft construction: Of cotton." The general column one rate of duty is 6.6 percent *ad valorem* and the textile category number is 369.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of the shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories applicable to textile merchandise, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

PROPOSED REVOCATION OF RULING LETTERS AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF CARRYING CASES FOR DIABETES MONITORING SYSTEMS

AGENCY: U.S. Customs Service; Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter and treatment relating to the classification of carrying cases for diabetes monitoring systems.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182,107 Stat. 2057), this notice advises interested parties that Customs intends to revoke three ruling letters relating to the tariff classification, under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of carrying cases for diabetes monitoring systems. Similarly, Customs proposes to revoke any treatment previously accorded by it to substantially identical merchandise that is contrary to the position set forth in this notice. Comments are invited on the correctness of the intended actions.

DATE: Comments must be received on or before August 10, 2001.

ADDRESS: Written comments are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be inspected at the same location during regular business hours.

FOR FURTHER INFORMATION CONTACT: Joe Shankle, Textiles Branch: (202) 927–2379.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act

of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to revoke three rulings relating to the tariff classification of carrying cases for diabetes monitoring systems. Although in this notice Customs is specifically referring to the revocation of Headquarters Ruling Letter (HQ) 962581, dated February 23, 2000 (Attachment A); HQ 958000, dated October 20, 1995, (attachment B) and HQ 958048, dated November 6, 1996 (Attachment C); this notice covers any rulings on this merchandise which may exist but have not been specifically identified that are contrary to the position set forth in this notice. Customs has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical merchandise that is contrary to the position set forth in this notice. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUSA. Any person involved with substantially identical merchandise should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical merchandise or of a specific ruling not identified in this notice that is contrary to the position set forth in this notice, may raise issues of reasonable care on the part of the importer or their agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In HQ 962581, Customs classified a carrying case for diabetics under subheading 9027.90.54, HTSUSA, as "* * * accessories: Of electrical instruments and apparatus: Other: Of instruments and apparatus of subheading 9027.20, 9027.30, 9027.40, 9027.50 and 9027.80." Based on our analysis of the scope of the terms of subheadings 9027.90.54, HTSUSA, and 4202.92.9060, HTSUSA, the Legal Notes, and the Explanatory Notes, carrying cases for diabetics of the type discussed herein, are classifiable in subheading 4202.92.9060, HTSUSA, which provides, in part, for "other" containers or cases.

In HQ 958000, Customs classified a carrying case for diabetics under subheading 4202.92.3030, HTSUSA, which provides, in part, for travel,

sports and similar bags: with outer surface of textile materials: Other, Other: Of man-made fibers: Other. Based on our analysis of the scope of the terms of subheadings 4202.92.3030, HTSUSA, and 4202.92.9026, HTSUSA, the Legal Notes, and the Explanatory Notes, carrying cases for diabetics of the type discussed herein, are classifiable in subheading 4202.92.9026, HTSUSA, which provides, in part, for "other" containers or cases.

In HQ 958048, Customs classified a carrying case for diabetics under subheading 4202.32.1000, HTSUSA, which provides for: "Articles of a kind normally carried in the pocket or in the handbag: With outer surface of sheeting of plastic or of textile materials: With outer surface of sheeting of plastic: Of reinforced or laminated plastics." Based on our analysis of the scope of the terms of subheadings 4202.32.1000, HTSUSA, and 4202.92.9060, HTSUSA, the Legal Notes, and the Explanatory Notes, carrying cases for diabetics of the type discussed herein, are classifiable in subheading 4202.92.9060, HTSUSA, which provides, in part, for "other" containers or cases.

Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to revoke HQ 962581, HQ 958000 and HQ 958048, and any other ruling not specifically identified, that is contrary to the position set forth in this notice, to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed HQ 964614 revoking HQ 962581 (attachment D), HQ 964615 revoking HQ 958000 (Attachment E), and HQ 964616 revoking HQ 958048 (Attachment F). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions that are contrary to the position set forth in this notice. Before taking this action, consideration will be given to any written comments timely received.

Dated: June 21, 2001.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, February 23, 2000.

CLA–2 RR:CR:GC 962581 HMC
Category: Classification
Tariff No. 9027.90.54

LEONARD L. ROSENBERG, ESQ.
SANDIER, TRAVIS & ROSENBERG, P.A.
THE WATERFORD
5200 Blue Lagoon Drive
Miami, FL 33126–2022

Re: Carrying Case for Accu-Check Diabetes Monitoring System.

DEAR MR. ROSENBERG:

This is in response to your letter, dated February 3, 1999, on behalf of Bag Factory, Inc., regarding the tariff classification of carrying cases for the Accu-Check Diabetes Monitoring System under the Harmonized Tariff Schedule of the United States (HTSUS). Headquarters Ruling letter ("HQ") 561283, dated August 26, 1999, considered your request for classification of the same merchandise under subheading 9817.00.96, HTSUS, as articles specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons; parts and accessories that are specially designed or adapted for use in the foregoing articles. We regret the delay.

Facts:

The facts set forth in HQ 561283 are as follows:

> The article under consideration is described as a carrying case for a diabetes monitoring system. This system is designed to permit a diabetic patient to perform reliable blood glucose self-monitoring (*i.e.*, ascertaining whether the patient's capillary whole blood glucose value is either too high or too low) as a necessary part of treatment. The system consists of a blood glucose monitor (with batteries), ten instant test strips, an adjustable lancet device with ten lancets, control solution, a self-test diary, a user's manual and reference guide which are all contained within a carrying case.
>
> To perform the necessary test, the patient must place a test strip into the monitor and, after pricking a fingertip with the lancet device, apply a drop of blood to the center of the strip's test pad. The monitor automatically begins to measure the patient's blood glucose level as soon as it senses the drop of blood on the strip. After approximately twelve seconds, the test results are displayed on the monitor. A visual color check can then be made immediately following the test by comparing the reaction color on the test strip with the color chart on the test strip vial. This visual check can be used to confirm the value obtained by the monitor. Once a patient's blood glucose level is determined, he or she can then, if necessary, inject insulin.
>
> The sample carrying case under consideration, measures approximately 4" x 6" x 1-1/2", and contains a zipper that extends along three sides of the pouch, permitting the pouch to lie flat when fully opened. Although the sample submitted is made of vinyl, we are informed that other materials (*e.g.*, leather or textile) may be used for the outermost covering in future shipments. Regardless of the material used on the outside of the case, the inside of the cases will all have identical features. Into the left side of the case are sewn two elastic bands: one horizontal band designed to hold the round vial of test strips and a second vertical band designed to hold the two-inch monitor. We are informed that future imports may include two vertical bands to provide better support for the monitor. Into the center or spine of the case is sewn a smaller, vertical elastic band designed to hold the lancet device. The right side of the case includes a zippered textile (or plastic) pouch designed to hold the individual lancets and bottle of control solution as well as a small pocket to hold the self-test diary and reference guide.
>
> You indicate that the carrying cases imported by your client are sold only to the manufacturer of the diabetes monitoring system, who has supplied the specifications and material necessary for their manufacture.

Issue:

Whether the carrying cases for the diabetes monitoring system is classifiable as other parts and accessories of electrical instruments and apparatus.

Law and Analysis:

Merchandise is classifiable under the HTSUS in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The HTSUS provisions under consideration are as follows:

9027	Instruments and apparatus for physical or chemical analysis (for example, polarimenters, refractometers, spectrometers, gas or smoke analysis apparatus); instruments and apparatus for measuring or checking viscosity, porosity, expansion, surface tension or the like; instruments and apparatus for measuring or checking quantities of heat, sound or light (including exposure meters); microtomes; parts and accessories thereof (con.):
9027.90	Microtomes; parts and accessories:
	Parts and accessories:
	Of electrical instruments and apparatus:
	Other:
9027.90.54	Of instruments and apparatus of subheading 9027.20, 9027.30, 9027.40, 9027.50 and 9027.80
* * * * * * *	
4202	Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber, or of paperboard, or wholly or mainly covered with such materials or with paper:
	Other:
4202.92	With outer surface of sheeting of plastic or of textile materials:
	Other:
4202.92.90	Other

There is no dispute that the diabetic monitoring system is described by heading 9027, HTSUS. You contend that the carrying cases should be classified under subheading 9027.90.54, HTSUS, because they are accessories that facilitate the use and handling of a diabetes monitoring system. You state that based on Note 2 to Chapter 90, the merchandise is precluded from classification in heading 4202, HTSUS.

Chapter 90, Note 2, HTSUS, states, in part, that subject to Note 1, parts and accessories for machines, apparatus, instruments or articles of this Chapter are to be classified according to the following rules:

> (a) Parts and accessories which are goods included in any of the headings of this chapter or of chapter 84, 85 or 91 (other than heading 8485, 8548 or 9033) are in all cases to be classified in their respective headings;
>
> (b) Other parts and accessories, if suitable for use solely or principally with a particular kind of machine, instrument or apparatus, or with a number of machines, instruments or apparatus of the same heading (including a machine, instrument or apparatus of heading 9010, 9013 or 9031) are to be classified with the machines, instruments or apparatus of that kind;
>
> (c) All other parts and accessories are to be classified in heading 9033.

Chapter 90, Note 2 controls and the carrying cases may not be classified under subheading 4202.92.90, HTSUS, if they are accessories of an instrument of heading 9027, HTSUS. Customs has held that the term "accessory" is generally understood to mean an article which is not necessary to enable the goods with which they are used to fulfill their intended function. They are of secondary importance, but must, however, contribute to the effectiveness of the principal article (e.g., facilitate the use or handling of the principal article, widen the range of its uses, or improve its operation). *See* HQ 952716, dated March 3, 1993, *Mita Copystar America, Inc. v. United States*, 966 F. Supp. 1245 (CIT 1997), motion for rehearing and reconsideration denied, 994 F. Supp. 393 (CIT 1998).

You state that the carrying cases are specially designed to carry the system's monitor, test strips, lancets, etc. and that they are solely used to carry such articles. You further ar-

gue that the carrying case are accessories because they facilitate the use and handling of the system's components. The components of the diabetic system are separated and organized so that the needed items are quickly located. We agree. It is Customs view that the carrying cases in this instance contribute to the effectiveness of the diabetic system for which they are designed because, in the event of an emergency, the organization of the system allows the user to find needed components fast. To determine the blood's glucose level and to administer insulin promptly is of paramount importance to the user. The carrying cases aid the system in this regard. We thus find that the carrying cases are accessories for the diabetes monitoring system.

Chapter 90, Note 2 (a) states that accessories which are goods included in any of the headings of this Chapter or of Chapter 84, 85 or 91 (other than heading 8485, 8548 or 9033) are in all cases to be classified in their respective headings. In this instance, there is no heading of Chapter 84, 85, 90 or 91 that specifically describes the carrying case. We then must apply Note 2 (b), which provides that accessories, if suitable for use solely or principally with a particular kind of machine, instrument or apparatus, or with a number of machines, instruments or apparatus of the same heading (including a machine, instrument or apparatus of heading 9010, 9013 or 9031) are to be classified with the machines, instruments or apparatus of that kind. As stated above, the merchandise is used solely with a diabetes apparatus of heading 9027, and as such, it is classified with this apparatus. The subject carrying cases are therefore classifiable under subheading 9027.90.54, HTSUS.

Holding:

The carrying cases for a diabetes monitoring system are classifiable under subheading 9027.90.54, HTSUS, as "* * * accessories: Of electrical instruments and apparatus: Other: Of instruments and apparatus of subheading 9027.20, 9027.30, 9027.40, 9027.50 and 9027.80."

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, October 20, 1995.

CLA–2 R:C:T 958000 GGD
Category: Classification
Tariff No. 4202.92.3030

MR. MARTY LANGTRY
TOWER GROUP INTERNATIONAL, INC.
2400 Marine Avenue
Redondo Beach, CA 90278–1103

Re: Reconsideration of New York Ruling Letter (NYRL) 809003; "Diabetic Carrying Case;" Travel/Toiletry Bag; Not Kind Normally Carried in Pocket or Handbag.

DEAR MR. LANGTRY:

This letter is in response to your request of May 5, 1995, on behalf of your client, Koszegi Industries, Inc., for reconsideration of NYRL 809003, issued April 26, 1995, and pertaining to the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of an item identified as a "diabetic carrying case" to be imported from either China or the Philippines. A sample was submitted with your request.

Facts:

In NYRL 809003, the article was classified in subheading 4202.92.3030, HTSUSA, textile category 670, the provision for "Travel, sports and similar bags: With outer surface of textile materials: Other, Other: Of man-made fibers: Other," with an applicable duty rate of 19.8 percent ad valorem. The cases, which are designed to carry small medical supplies, will

be imported empty and sold only to a medical equipment company. That company will insert supplies needed by diabetics (e.g., syringes, testing tools, etc.), then sell the kits to doctors, hospitals, or clinics, which will either sell or give them to diabetics.

The sample is a carrying bag that measures approximately 7 inches in length by 4-1/2 inches in height by 1-1/2 inches in depth, is zippered on 3 sides, and is similar to a travel or toiletry case. The bag's exterior is composed of nylon woven fabric. The interior features 2 clear plastic pockets, each of which extends the length and height of each side. A nylon zippered bag, which measures approximately 6-1/2 inches by 3-1/4 inches, is sewn into one of the interior ends.

Issue:

Whether the "Diabetic Carrying Case" is classified in subheading 4202.32.9550, HTSUSA, the provision for articles of a kind normally carried in the pocket or handbag, with outer surface of textile materials, of man-made fibers; or subheading 4202.92.3030, HTSUSA, the provision for travel, sports and similar bags, with outer surface of textile materials, of man-made fibers.

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the harmonized system is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and GRIs.

Heading 4202, HTSUS, provides, in part, for traveling bags, toiletry bags, handbags, wallets, cigarette cases, tobacco pouches and similar containers. Since the "diabetic carrying case" is similar to a traveling or toiletry bag, it is covered by the heading.

Subheading 4202.32, as well as subheadings 4202.31 and 4202.39, HTSUS, cover articles of a kind normally carried in the pocket or handbag. The subheading EN to these subheadings states that:

> [t]hese subheadings cover articles of a kind normally carried in the pocket or in the handbag and include spectacle cases, note-cases (bill-folds), wallets, purses, key-cases, cigarette-cases, cigar-cases, pipe-cases and tobacco-pouches.

Although the listed examples are merely guidance to facilitate classification, they provide an indication that the "diabetic carrying case" is not within the scope of subheading 4202.32, HTSUS. We note that most, if not all, of the example articles would not only fit comfortably into handbags, but also into pockets of shirts, coats, or trousers. Even without contents, the "diabetic carrying case" would be a tight fit in a large coat pocket, and be unlikely to fit into most other pockets.

Subheading 4202.92, HTSUS, provides in part for travel, sports and similar bags. Additional U.S. Note 1 to chapter 42, HTSUS, states that:

> [f]or the purposes of heading 4202, the expression "travel, sports and similar bags" means goods, other than those falling in subheadings 4202.11 through 4202.39, of a kind designed for carrying clothing and other personal effects during travel, including backpacks and shopping bags of this heading, but does not include binocular cases, camera cases, musical instrument cases, bottle cases and similar containers.

You essentially contend that, due to the nature of **diabetes**, the diabetic must use the instruments to be contained in this case several times a day, and that since the case has no strap or other carrying attachment, it is designed to fit into a handbag or other bag.

In Headquarters Ruling Letter (HRL) 956666, issued May 30, 1995, this office classified two separate cosmetic bags, one with a "hanging loop" and one without, but each with approximately the same size and features as the "diabetic carrying case." We cited to HRL 951534, issued August 4, 1992, for that ruling's conclusion that, although smaller cosmetic bags might reasonably by described by either provision, the subheading for travel, sports and similar bags (4202.92, HTSUS) more specifically provides for all cosmetic bags than the subheading for articles of a kind normally found in the handbag (4202.32). We then determined that all articles answering to the description of cosmetic or toiletry bags are principally used for travel, and classified the cosmetic bags as travel bags of subheading

4202.92.3030, HTSUSA. We likewise find that the "Diabetic Carrying Case" is the kind of bag designed to carry a diabetic's personal effects during travel, and is classified in subheading 4202.92.3030, HTSUSA.

Holding:

The article identified as a "Diabetic Carrying Case" is properly classified in subheading 4202.92.3030, HTSUSA, textile category 670, the provision for "Travel, sports and similar bags: With outer surface of textile materials: Other, Other: Of man-made fibers: Other." The applicable rate of duty is 19.8 percent ad valorem.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, the Status Report On Current Import Quotas (Restraint Levels), an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories applicable to textile merchandise, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

NYRL 809003, issued April 26, 1995, is hereby affirmed.

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, November 6, 1996.

CLA–2 RR:TC:TE 958048 GGD
Category: Classification
Tariff No. 4202.32.1000

PORT DIRECTOR
U.S. CUSTOMS SERVICE
10 Causeway Street, Room 603
Boston, MA 02222–1059

Re: Decision on Application for Further Review of Protest No. 0401–95–100131, filed February 23, 1995, concerning the classification of small vinyl carrying cases.

DEAR SIR:

This is a decision on a protest timely filed on February 23, 1995, against your decision in the classification and liquidation of five entries of small vinyl cases, entered in August 1994.

Facts:

You classified the merchandise under subheading 4202.92.9040, HTSUSA, the provision for "Trunks, suitcases, vanity cases * * * and similar containers; traveling bags, toiletry bags * * * and similar containers * * *: Other: With outer surface of sheeting of plastic * * *: Other: Other, Other," with an applicable duty rate in 1994 of 20 (now 19.5) percent ad valorem.

The protestant claims that the goods should be classified in subheading 4202.32.1000, HTSUSA, the provision for "Articles of a kind normally carried in the pocket or in the handbag: With outer surface of sheeting of plastic or of textile materials: With outer surface of sheeting of plastic: Of reinforced or laminated plastics," with an applicable duty rate of 12.1 cents per kilogram plus 4.6 percent ad valorem.

Each of the two available sample cases is substantially identical in appearance to the other, except for the fact that one is labeled "Made in China" and the other is labeled "Made in

Belgium." The articles are tri-fold in design and have snap closures. When folded/closed, the items measure approximately 5-3/4 inches in width by 3-3/4 inches in height by 1/2 inch in depth.

The outer surface of the case marked "Made in Belgium" is composed of embossed cellular polyvinyl chloride (PVC) plastic, one side of which has been applied to a layer of nonwoven textile fabric. The case marked "Made in China" has a layered structure, the outer layer of which is composed of embossed non-cellular polyurethane plastic. The second layer consists of a cellular PVC plastic. The third layer is an adhesive which bonds the fourth layer, a nonwoven textile fabric, to the cellular plastic second layer. The textile material in both cases, is present for purposes of reinforcement.

The cases are intended for post importation use as carrying cases for **diabetes** (blood glucose) testing kits. The interior sections of each case contain two clear plastic compartments to hold test strips and a sensor, vinyl slots for lancets, and an elasticized loop to hold a lancing device in place. Information on retail packaging states, in part, that the case (with contents) is "Compact—fits in pocket or purse. Convenient—test practically anywhere, anytime."

Issue:

Whether the goods are properly classified in subheading 4202.92, HTSUS, as other containers or cases; or in subheading 4202.32, HTSUS, as articles of a kind normally carried in the pocket or in the handbag.

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and GRI.

Among other goods, heading 4202, HTSUS, provides for traveling bags, toiletry bags, wallets, purses, and similar containers. Since the merchandise is roughly similar to a wallet or small purse, it is covered by the heading.

Subheading 4202.32, as well as subheadings 4202.31 and 4202.39, HTSUS, cover articles of a kind normally carried in the pocket or handbag. The subheading EN to these three subheadings states that:

> [t]hese subheadings cover articles of a kind normally carried in the pocket or in the handbag and include spectacle cases, note-cases (bill-folds), wallets, purses, key-cases, cigarette-cases, cigar-cases, pipe-cases and tobacco-pouches.

On June 21, 1995, this office published a General Notice in the CUSTOMS BULLETIN, Volume 29, Number 25, concerning goods identified as "Wallets on a String." The attributes of both handbags and articles of a kind normally carried in the pocket or in the handbag were discussed. With regard to Articles of a Kind Normally Carried in the Pocket or in the Handbag, the notice stated in pertinent part that:

> Such articles include wallets, which may be described as flat cases or containers fitted to hold credit/identification cards, paper currency, coins and in some instances a checkbook holder.
>
> In order to be classifiable as a flatgood, the article must fit comfortably in a handbag or pocket. For example, rectangular or square cases measuring approximately 7-1/2 inches by 4-1/2 inches, or 4–3/4 inches by 4–1/2 inches, in their closed position, have been classified as flatgoods.

Although the protested cases are not wallets, they are articles of a kind that would normally be carried in a pocket or handbag. They are small enough to comfortably fit into the pockets of most garments, a useful feature when prompt blood glucose monitoring is required and the handbag has been left behind. Like wallets, the articles are fitted to hold certain small items, each of which is most conveniently retained in its own section of the interior space. We thus conclude that the small vinyl cases are classifiable as articles of a kind normally carried in the pocket or in the handbag.

Holding:

The small vinyl cases are classified in subheading 4202.32.1000, HTSUSA, the provision for "Articles of a kind normally carried in the pocket or in the handbag: With outer surface of sheeting of plastic or of textile materials: With outer surface of sheeting of plastic: Of reinforced or laminated plastics." The applicable duty rate is 12.1 cents per kilogram plus 4.6 percent ad valorem.

Since reclassification of the merchandise as indicated above will result in a lower rate of duty than claimed, you are instructed to allow the protest in full. A copy of this decision should be attached to the Form 19 to be returned to the protestant.

In accordance with Section 3A(11)(b) of Customs Directive 099 3550–065, dated August 4, 1993, Subject: Revised Protest Directive, this decision should be mailed by your office to the protestant no later than 60 days from the date of this letter. Any reliquidation of the entry in accordance with the decision must be accomplished prior to mailing of the decision. Sixty days from the date of the decision, the Office of Regulations and Rulings will take steps to make the decision available to Customs personnel via the Customs Rulings Module in ACS, and to the public via the Diskette Subscription Service, the Freedom of Information Act, and other public access channels.

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:TE 964614 JFS
Category: Classification
Tariff No. 4202.92.9060 and 9817.00.96

LEONARD L. ROSENBERG
SANDLER, TRAVIS & ROSENBERG, P.A.
THE WATERFORD
5200 Blue Lagoon Drive
Miami, FL 33126–2022

Re: Revocation of Headquarters Ruling Letter (HQ) 962581, dated February 23, 2000; Classification of a Carrying Case for a Diabetes Monitoring System; Nairobi Protocol; Heading 4202, HTSUSA; Binocular Cases, Camera Cases, Musical Instrument Cases and Similar Containers; Not Heading 9027, HTSUSA; Not Accessories of Instruments and Apparatus for Physical or Chemical Analysis.

DEAR MR. ROSENBERG:

On February 5, 1999, Customs received your request for a binding ruling on a carrying case for the Accu-Check Diabetes Monitoring System. In response, Customs issued two rulings. In HQ 561283, dated August 26, 1999, Customs ruled that the subject case was "specially designed or adapted for the handicapped" within the meaning of the Nairobi Protocol, Annex E, to the Florence Agreement, as codified in the Education, Scientific, and Cultural Materials Act of 1982, and was thus eligible for duty-free treatment under subheading 9817.00.96, of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). In HQ 962581, Customs classified the subject case under subheading 9027.90.54, HTSUSA, as "* * * accessories: Of electrical instruments and apparatus: Other: Of instruments and apparatus of subheading 9027.20, 9027.30, 9027.40, 9027.50 and 9027.80."

This letter is to inform you that Customs has reconsidered HQ 962581. After review of the ruling, it has been determined that the classification of the case for the diabetes monitoring system in subheading 9027.90.54, HTSUSA, was incorrect. For the reasons that follow, this ruling revokes HQ 962581. However, Customs ruling in HQ 561283, concerning

the eligibility of the carrying case for preferential tariff treatment under the Nairobi Protocol was correct and is not revoked or otherwise modified in this ruling.

Facts:

The subject carrying case was described in both HQ 561283 and HQ 962581, as follows:

> The article under consideration is described as a carrying case for a diabetes monitoring system. This system is designed to permit a diabetic patient to perform reliable blood glucose self-monitoring (*i.e.*, ascertaining whether the patient's capillary whole blood glucose value is either too high or too low) as a necessary part of treatment. The system consists of a blood glucose monitor (with batteries), ten instant test strips, an adjustable lancet device with ten lancets, control solution, a self-test diary, a user's manual and reference guide which are all contained within a carrying case.
>
> To perform the necessary test, the patient must place a test strip into the monitor and, after pricking a fingertip with the lancet device, apply a drop of blood to the center of the strip's test pad. The monitor automatically begins to measure the patient's blood glucose level as soon as it senses the drop of blood on the strip. After approximately twelve seconds, the test results are displayed on the monitor. A visual color check can then be made immediately following the test by comparing the reaction color on the test strip with the color chart on the test strip vial. This visual check can be used to confirm the value obtained by the monitor. Once a patient's blood glucose level is determined, he or she can then, if necessary, inject insulin.
>
> The sample carrying case under consideration, measures approximately 4" x 6" x 1-1/2", and contains a zipper that extends along three sides of the pouch, permitting the pouch to lie flat when fully opened. Although the sample submitted is made of vinyl, we are informed that other materials (*e.g.*, leather or textile) may be used for the outermost covering in future shipments. Regardless of the material used on the outside of the case, the inside of the cases will all have identical features. Into the left side of the case are sewn two elastic bands: one horizontal band designed to hold the round vial of test strips and a second vertical band designed to hold the two-inch monitor. We are informed that future imports may include two vertical bands to provide better support for the monitor. Into the center or spine of the case is sewn a smaller, vertical elastic band designed to hold the lancet device. The right side of the case includes a zippered textile (or plastic) pouch designed to hold the individual lancets and bottle of control solution as well as a small pocket to hold the self-test diary and reference guide.
>
> You indicate that the carrying cases imported by your client are sold only to the manufacturer of the diabetes monitoring system, who has supplied the specifications and material necessary for their manufacture.

Issue:

Is the carrying case for a diabetes monitoring system properly classifiable under heading 4202, HTSUSA, as a similar container to the *eo nomine* exemplars of the heading or under heading 9027, HTSUSA, as an accessory to instruments and apparatus for physical or chemical analysis?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI.

Heading 9027, HTSUSA, provides for:

> Instruments and apparatus for physical or chemical analysis (for example, polarimeters, refractometers, spectrometers, gas or smoke analysis apparatus); instruments and apparatus for measuring or checking viscosity, porosity, expansion, surface tension or the like; instruments and apparatus for measuring or checking quantities of heat, sound or light (including exposure meters); microtomes; parts and accessories thereof

Note 2 to Chapter 90, HTSUSA, states, in part, that parts and accessories for machines, apparatus, instruments or articles of Chapter 90 are to be classified according to the following rules:

> (a) Parts and accessories which are goods included in any of the headings of this chapter or of chapter 84, 85 or 91 (other than heading 8485, 8548 or 9033) are in all cases to be classified in their respective headings;
>
> (b) Other parts and accessories, if suitable for use solely or principally with a particular kind of machine, instrument or apparatus, or with a number of machines, instruments or apparatus of the same heading (including a machine, instrument or apparatus of heading 9010, 9013 or 9031) are to be classified with the machines, instruments or apparatus of that kind;
>
> (c) All other parts and accessories are to be classified in heading 9033.

In HQ 962581, Customs classified the instant carrying case under heading 9027, HTSUSA. Customs stated that the diabetic monitoring system was described by heading 9027, HTSUSA, and, relying on Chapter Note 2, Chapter 90, HTSUSA, Customs classified the carrying case as an accessory under subheading 9027.90.54, HTSUSA. Noting that the term "accessory" is generally understood to mean an article of secondary importance which contributes to the effectiveness of a principal article, Customs stated that the carrying case qualified as an accessory because it facilitated the use and handling of the system's components.

However, prior to HQ 962581, Customs had consistently classified similar articles, often described as "diabetic carrying cases" under heading 4202, HTSUSA. See New York Ruling Letter (NY) E84197, dated August 16, 1999; NY E81946, dated May 28, 1999; Port Ruling Letter (PD) C88022, June 4, 1998; HQ 958048, dated November 6, 1996; HQ 958000, dated October 20, 1995; NY 809003, dated April 26, 1995; and NY 804966, dated December 19, 1994.

Heading 4202, HTSUSA, provides for:

> Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper.

The EN to heading 4202, HTSUSA, state that the heading only covers the specifically named containers and similar containers. Applying the principle of statutory construction known as *ejusdem generis*, which means "of the same kind," Customs finds that the instant carrying case is covered by the term "similar containers."

Under the rule of *ejusdem generis*, where an enumeration of specific things is followed by a general word or phrase, the general word or phrase is held to refer to things of the same kind as those specified. With respect to the broad reach of the residual provision for "similar containers" in heading 4202, HTSUSA, the courts have found that the rule of *ejusdem generis* requires that the imported merchandise possess the essential characteristices or purpose that unite the articles enumerated in order to be classified under the general term. *Totes, Inc. v. United States*, 18 Ct. Int'l Trade 919, 865 F. Supp. 867, 871 (1994), *aff'd*, 69 F.3d 495 (1995). In *Totes*, the Court of Appeals for the Federal Circuit (CAFC) affirmed the Court of International Trade's (CIT) determination that the "essential characteristics and purpose of Heading 4202 exemplars are * * * to organize, store, protect and carry various items." Applying the rationale set forth in *Totes*, Customs finds that the instant carrying case serves the purposes of organizing, storing, protecting and carrying various blood glucose monitoring system items and is therefore classified under heading 4202, HTSUSA, as a "similar container."

The conflict between the "similar containers" provision of heading 4202, HTSUSA, and provisions for "accessories" was also resolved in the *Totes* case. The CAFC held that the "similar container" provision of heading 4202, HTSUSA, more specifically described a trunk organizer than the competing provision for automobile accessories. *Id*. 69 F.3d at 499. Although the trunk organizer was *prima facie* classifiable under the provision for similar containers and that for accessories for motor vehicles, the court stated that the competing provisions were not equal. *Id*. The court found that "containers," which essentially have the one principal function of containing, even though encompassing a wide variety of

items, is a more specific term than "accessory" which can include a wide variety of items having many different functions. *Id*. Applying this rationale to the instant case, we find that the carrying case is more specifically described by the provision for "similar containers" of heading 4202, HTSUSA, than the competing provision for accessories of instruments for physical or chemical analysis.

One distinguishable aspect of the *Totes* case must be addressed. In *Totes*, the applicable EN stated that accessories covered more specifically by another heading were excluded from the section. Furthermore, the EN listed tool bags of heading 4202, HTSUSA, as an example of an accessory covered more specifically by heading 4202, HTSUSA. In contrast, Note 2 to Chapter 90, HTSUSA, and the EN applicable to the present case do not contain similar language. However, Customs notes that the decision in the *Totes* case was not based on the EN. The EN were merely cited in support of the court's decision that the provision for similar containers was more specific than the provision for accessories.

Cases for instruments of Chapter 90, HTSUSA, are not classifiable under the provision for accessories. Camera cases and binocular cases are *eo nomine* exemplars of heading 4202, HTSUSA, and are classified in heading 4202, HTSUSA, despite the fact that they are also accessories to cameras and binoculars classified in Chapter 90, HTSUSA. Customs believes that heading 4202, HTSUSA, would not specifically name these cases if the intent was to apply Note 2 to Chapter 90, HTSUSA, and classify cases as accessories to the goods of Chapter 90, HTSUSA. Customs is unable to distinguish the diabetes monitoring system carrying case from the eo nomine exemplars and "similar containers" of heading 4202, HTSUSA. Thus, the instant carrying case is properly classified with other similar specially shaped or fitted cases of heading 4202, HTSUSA.

With respect to classification at the subheading level, the article was classified at the time of entry under subheading 4202.32, HTSUSA, as an article of a kind normally carried in the pocket or in the handbag. However, the instant carrying case is not similar to the exemplars listed in the EN for subheading 4202.32, HTSUSA, such as wallets, key-cases and cigarette cases. Although it is of a size similar to the goods of subheading 4202.32, HTSUSA, Customs finds that its characteristics and functions are similar to other specialty cases such as musical instrument cases, camera cases, binocular cases and compact disk cases which are classified under subheading 4202.92, HTSUSA. Accordingly, Customs finds that the carrying case is classified under subheading 4202.92.9060, HTSUSA, which provides, in part, for "Trunks, suitcases * * * spectacle cases, binocular cases, camera cases * * * : Other: With outer surface of sheeting of plastic or of textile materials: Other: Other, Other: Other."

For a similar ruling, see HQ962132, dated October 26, 2000.

Holding:

The carrying case for the Accu-Check Diabetes Monitoring System is classified under subheading 4202.92.9060, HTSUSA. However, pursuant to Customs prior decision in HQ 561283, the carrying case is eligible for duty-free treatment under subheading 9817.00.96, HTSUSA, the provision for "[a]rticles specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons; parts and accessories (except parts and accessories of braces and artificial limb prosthetics) that are specially designed or adapted for use in the foregoing articles: Other". The general column one duty rate is "Free."

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT E]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA-2 RR:CR:TE 964615 JFS
Category: Classification
Tariff No. 4202.92.9026

MR. MARTY LANGTRY
TOWER GROUP INTERNATIONAL, INC.
2400 Marine Avenue
Redondo Beach, CA 90278-1103

Re: Revocation of HQ 958000, dated October 20, 1995; Classification of a Carrying Case for Diabetics; Heading 4202, HTSUSA; Binocular Cases, Camera Cases, Musical Instrument Cases and Similar Containers.

DEAR MR. LANGTRY:

This letter is to inform you that Customs has reconsidered Headquarters Ruling Letter (HQ) 958000, issued on October 20, 1995, concerning the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of a carrying case for diabetics. After review of that ruling, it has been determined that the classification of the carrying case in subheading 4202.92.3030, HTSUSA, was incorrect. For the reasons that follow, this ruling revokes HQ 958000.

Facts:

In HQ 958000, Customs sustained its decision in New York Ruling Letter (NY) 809004, dated April 26, 1995, classifying the article under consideration in subheading 4202.92.3030, HTSUSA (now subheading 4202.92.3031, HTSUSA). Subheading 4202.92.3030, HTSUSA, provides, in part, for "Travel, sports and similar bags: with outer surface of textile materials: Other, Other: Of man-made fibers: Other."

In HQ 958000, the carrying case was described as follows:

> The cases, which are designed to carry small medical supplies, will be imported empty and sold only to a medical equipment company. That company will insert supplies needed by diabetics (e.g., syringes, testing tools, etc.), then sell the kits to doctors, hospitals, or clinics, which will either sell or give them to diabetics.
>
> The sample is a carrying bag that measures approximately 7 inches in length by 4-1/4 inches in height by 1-1/2 inches in depth, is zippered on 3 sides, and is similar to a travel or toiletry case. The bag's exterior is composed of nylon woven fabric. The interior features 2 clear plastic pockets, each of which extends the length and height of each side. A nylon zippered bag, which measures approximately 6-1/2 inches by 3-1/4 inches, is sewn into one of the interior ends.

Issue:

Is the carrying case for diabetics properly classified under subheading 4202.92.3031, HTSUSA, the provision for "travel, sports and similar bags," or is it properly classified under subheading 4202.92.9026, the provision for "other" containers or cases?

Law and Analysis:

Classification of goods under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI.

The carrying case is classified in heading 4202, HTSUSA, which provides for:

> Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and backpacks, hand-

bags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper.

At the subheading level, the carrying case can be classified as a travel, sports or similar bag under subheading 4202.92.31, HTSUSA, or it can be classified as an "other" container or case under subheading 4202.92.9026. The additional U.S. notes become applicable at the eight-digit level or U.S. subdivision of the international subheadings. Concerning travel, sports and similar bags, Additional U.S. Note 1 to chapter 42, HTSUS, states that:

> For the purposes of heading 4202, the expression "travel, sports and similar bags" means goods, other than those falling in subheadings 4202.11 through 4202.39, of a kind designed for carrying clothing and other personal effects during travel, including backpacks and shopping bags of this heading, but does not include binocular cases, camera cases, musical instrument cases, bottle cases and similar containers.

In HQ 962132, dated October 26, 2000, Customs considered the classification of carrying cases for a blood glucose monitoring system. The carrying cases were designed with specially fitted compartments to hold the components of the monitoring system. Customs found that the carrying cases had the same characteristics and functions as other specialty cases such as musical instrument cases, camera cases, binocular cases and compact disk cases. Due to the similarity of the cases, Customs classified the carrying cases for the blood glucose monitoring system in the same subheading as the specially fitted cases, i.e., subheading 4202.92.90, HTSUSA.

Like the carrying cases in HQ 962132, the instant carrying case is designed with specially fitted compartments to hold and carry supplies needed by diabetics. The instant carrying case has the same characteristics and functions as the specialty cases that are classified under subheading 4202.92.9026, HTSUSA, as "other" containers or cases. Moreover, these specialty cases are specifically excluded from classification as "travel, sports and similar bags" by operation of Additional U.S. Note 1 to chapter 42, HTSUSA. Accordingly, Customs finds that the carrying case is classified under subheading 4202.92.9026, HTSUSA, which provides, in part, for "Trunks, suitcases * * * spectacle cases, binocular cases, camera cases * * * : Other: With outer surface of sheeting of plastic or of textile materials: Other: Other, Other: Of man made fibers." See, HQ 962132. See also, Port Decision (PD) 88022, dated June 4, 1998;

Holding:

HQ 958000 is revoked. The carrying case for diabetics is classified under subheading 4202.92.9026, HTSUSA. The general column one duty rate is 18.6% ad valorem and the applicable textile category designation is 670.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent negotiations and changes, we suggest that the importer check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an issuance of the U.S. Customs Service, which is updated weekly and is available at the local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, the importer should contact the local Customs office prior to importing the merchandise to determine the current status of any import restraints or requirements.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT F]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC.
CLA-2 RR:CR:TE 964616 JFS
Category: Classification
Tariff No. 4202.92.9060

MS. ELLEN L. FEDERMAN
SOLLER, SHAYNE & HORNE
65 Franklin Street
Boston, MA 02110

Re: Revocation of HQ 958048, dated November 6, 1996; Classification of a Carrying Case for a Blood Glucose Monitoring System; Diabetes; Heading 4202, HTSUSA; Binocular Cases, Camera Cases, Musical Instrument Cases and Similar Containers.

DEAR MS. FEDERMAN:

This letter is to inform you that Customs has reconsidered Headquarters Ruling Letter (HQ) 958048, issued to you on behalf of your client MediSense, Inc., on November 6, 1996, concerning the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of carrying cases for blood glucose testing kits. After review of that ruling, it has been determined that the classification of the carrying cases in subheading 4202.32.1000, HTSUSA, was incorrect. For the reasons that follow, this ruling revokes HQ 958048.

Facts:

The carrying cases that are the subject of this revocation were reclassified at entry in subheading 4202.92.9040, HTSUSA (now 4202.92.9060, HTSUSA), the provision for "Trunks, suitcases, vanity cases * * * and similar containers; traveling bags, toiletry bags * * * and similar containers * * *: Other: With outer surface of sheeting of plastic * * *: Other: Other, Other." The importer contested this classification, contending that the proper classification for the carrying cases is under subheading 4202.32.1000, HTSUSA, the provision for "Articles of a kind normally carried in the pocket or in the handbag: With outer surface of sheeting of plastic or of textile materials: With outer surface of sheeting of plastic: Of reinforced or laminated plastics." Customs agreed with the protestant and issued HQ 958048.

In HQ 958048, the carrying cases were described as follows:

> Each of the two available sample cases is substantially identical in appearance to the other, except for the fact that one is labeled "Made in China" and the other is labeled "Made in Belgium." The articles are tri-fold in design and have snap closures. When folded/closed, the items measure approximately 5-3/4 inches in width by 3-1/4 inches in height by 1/2 inch in depth.
>
> The outer surface of the case marked "Made in Belgium" is composed of embossed cellular polyvinyl chloride (PVC) plastic, one side of which has been applied to a layer of nonwoven textile fabric. The case marked "Made in China" has a layered structure, the outer layer of which is composed of embossed non-cellular polyurethane plastic. The second layer consists of a cellular PVC plastic. The third layer is an adhesive which bonds the fourth layer, a nonwoven textile fabric, to the cellular plastic second layer. The textile material in both cases, is present for purposes of reinforcement.
>
> The cases are intended for post importation use as carrying cases for diabetes (blood glucose) testing kits. The interior sections of each case contain two clear plastic compartments to hold test strips and a sensor, vinyl slots for lancets, and an elasticized loop to hold a lancing device in place. Information on retail packaging states, in part, that the case (with contents) is "Compact—fits in pocket or purse. Convenient—test practically anywhere, anytime.

Issue:

Are the carrying cases for blood glucose monitoring kits properly classified under subheading 4202.32, HTSUSA, as an article of a kind normally carried in the pocket or in the handbag, or under subheading 4202.92.90, as an "other" container or case?

Law and Analysis:

Classification of goods under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation (GRI). GRI 1 provides

that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI.

The carrying cases are classified in heading 4202, HTSUSA, which provides for:

> Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper.

At the subheading level, the articles were classified in HQ 958948 under subheading 4202.32, HTSUSA, as articles of a kind normally carried in the pocket or in the handbag. However, the carrying cases are not similar to the exemplars listed in the EN for subheading 4202.32, HTSUSA, such as wallets, key-cases and cigarette cases. Although they are of a size similar to the goods of subheading 4202.32, HTSUSA, Customs finds that their characteristics and functions are similar to other specialty cases such as musical instrument cases, camera cases, binocular cases and compact disk cases which are classified under subheading 4202.92, HTSUSA. Accordingly, Customs finds that the carrying cases are classified under subheading 4202.92.9060, HTSUSA, which provides, in part, for "Trunks, suitcases * * * spectacle cases, binocular cases, camera cases * * *: Other: With outer surface of sheeting of plastic or of textile materials: Other: Other, Other: Other." See, HQ 962132, dated October 26, 2000. See also, Port Decision (PD) 88022, dated June 4, 1998.

Holding:

The carrying cases for the blood glucose monitoring kits are classifiable under subheading 4202.92.9060, HTSUSA. The general column one duty rate is 18.6% *ad valorem*.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest you check, close to the time of shipment, the Status Report on Current Import Quotas (Restraint Levels), an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

In order to ensure uniformity in Customs' classification of this merchandise and eliminate uncertainty, pursuant to section 177.9(d)(1), Customs Regulations (19 CFR 177.9(d)(1)), HQ 958048 is revoked.

In *San Francisco Newspaper Printing Co. v. United States*, 9 C.I.T. 517, 620 F. Supp. 738 (1985), the Court of International Trade held that Customs is not authorized to rescind a denial of a protest. Therefore, we cannot reconsider our position with respect to the entries at issue in HQ 958048. However, with respect to future importations of the subject merchandise, HQ 958048 will no longer control the classification.

JOHN DURANT,
Director,
Commercial Rulings Division.

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF PURADD FD–100, PREVIOUSLY KNOWN AS PLURADYNE FD–100

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of ruling letter and treatment relating to the tariff classification of PURADD FD–100, previously known as Pluradyne FD–100.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling letter pertaining to the tariff classification of PURADD FD–100, previously known as Pluradyne FD–100, and is revoking any treatment previously accorded by Customs to substantially identical transactions, under the Harmonized Tariff Schedule of the United States (HTSUS). Notice of the proposed revocation was published on April 18, 2001, in Volume 35, Number 16, of the CUSTOMS BULLETIN. One comment was received in response to this notice.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after September 10, 2001.

FOR FURTHER INFORMATION CONTACT: Allyson Mattanah, General Classification Branch, (202) 927–2326.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts, which emerge from the law, are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, Customs published a notice in the April 18, 2001, CUSTOMS BULLETIN, Volume 35, Number 16, proposing to revoke Customs Headquarters rulings (HQ) 956585, dated April 10, 1995, pertaining to the tariff classification of PURADD FD–100, previously known as Pluradyne FD–100, and to revoke any treatment accorded to substantially identical transactions. One comment was received in response to this notice.

In HQ 956585, Customs ruled that PURADD FD–100, previously known as Pluradyne FD–100, was classified in subheading 3811.19.00, HTSUS, the provision for other antiknock preparations. The decision in this ruling was based on the understanding that PURADD FD–100 is used as an antiknock preparation. We now believe this statement is in error. Instead, the merchandise is classified in subheading 3811.90.00, HTSUS, which provides for preparations and prepared additives other than antiknock preparations or additives for lubricating oil.

As stated in the proposed notice, this revocation will cover any rulings on this issue which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the issue subject to this notice, should have advised Customs during the notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by Title VI, Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, have been the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations involving the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should have advised Customs during the notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

Customs, pursuant to section 625(c)(1), is revoking HQ 956585, and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letter (HQ) 964310 set forth as the attachment to this document. Additionally, pursuant to section 625(c)(2), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: June 26, 2001.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, June 26, 2001.

CLA–2 RR:CR:GC 964310 AM
Category: Classification
Tariff No. 3811.90.00

MR. JAMES S. O'KELLY
BARNES, RICHARDSON & COLBURN
475 Park Ave. South
New York, NY 10016

Re: HQ 956585 revoked; PURADD FD–100, previously known as Pluradyne FD–100.

DEAR MR. O'KELLY:

This is in reference to your letter of June 21, 2000, on behalf of BASF Corporation, requesting reconsideration of HQ 956585, dated April 10, 1995, concerning the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of PURADD FD–100. In HQ 956585, it was determined that Pluradyne FD–100 was classifiable in subheading 3811.19.00, HTSUS, which provides for "[A]ntiknock preparations, oxidation inhibitors, gum inhibitors, viscosity improvers, anti-corrosive preparations and other prepared additives, for mineral oils (including gasoline) or for other liquids used for the same purposes as mineral oils: [A]ntiknock preparations: [O]ther." You state that PURADD FD–100 is the new name for Pluradyne FD–100, but that the two products are chemically the same.

We have reconsidered HQ 956585, and the additional information contained in your submissions, dated January 10 and February 15, 2001. We have also considered arguments you presented in a meeting at U.S. Customs Headquarters on February 22, 2001. We find the classification for the subject merchandise in HQ 956585 to be incorrect. The merchandise is not an antiknock preparation; rather, it is a gasoline detergent. Accordingly, the correct classification for the merchandise is subheading 3811.90.00, the provision for "[A]ntiknock preparations, oxidation inhibitors, gum inhibitors, viscosity improvers, anti-corrosive preparations and other prepared additives, for mineral oils (including gasoline) or for other liquids used for the same purposes as mineral oils: [O]ther."

Pursuant to section 625 (c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), notice of the proposed revocation of HQ 956585, was published on April 18, 2001, in Volume 35, Number 16, of the CUSTOMS BULLETIN. Your comment was the only comment received in response to the notice. Your are opposing the revocation in favor of classification in subheading 3902.20.50, HTSUS, the provision for "[P]olymers of propylene or of other olefins, in primary forms: [P]olyisobutylene: [O]ther." After careful consideration of the comment, as set forth in this ruling, we have determined to proceed with the revocation.

Facts:

The subject merchandise is PURADD FD–100 (the same merchandise as the subject of HQ 956585, Pluradyne FD–100). PURADD FD–100 is a clear, colorless, viscous liquid mix-

ture consisting of about 52% polyisobutylene amine (PIB–CH2–NH2, hereinafter "PIB amine") and several saturated hydrocarbons or paraffinic solvent. After entry into the United States, the merchandise is blended with carrier oil, and anti-corrosive and other ingredients to produce a final product consisting of approximately 26%–40% PIB amine. This final multi-purpose product is called PURADD AP–97 and is sold to gasoline suppliers as a detergent additive for mixing into their gasoline in accordance with regulations of the Environmental Protection Agency (EPA). (40 CFR §80.140 *et seq.*).

Polyisobutenamines are used as gasoline detergent additives. Ullmann's Encyclopedia of Industrial Chemistry, states:

> The development of second-generation detergent additives made it possible to keep the hot inlet valve clean. Long-chain, high molecular mass alkyl compounds with a polar end group are very effective. * * * Effective second-generation additives are, for example, **polyisobutenamines**, polyisobutenepolyamides, or long-chain carboxylic acid amines. These detergents are frequently used in combination with very thermally stable carrier oils that keep the surface of the valve lubricated and ensure continuous flowing off of deposit particles. Ullmann's Encyclopedia of Industrial Chemistry, v. A16, 5th ed., p. 735 (emphasis added).

Second-generation gasoline detergent additives such as polyisobutenamines have a mode of action analogous to that of corrosion inhibitors. Mechanistically, the polar end of the molecule (e.g., amine group) is attached to the metal surface; while a nonpolar, high molecular mass alkyl chain at the other end of the molecule (polyisobutylene) extends into the hydrocarbon fuel. *Id.* at p. 733. The surface activity of the polar groups ensures the formation of a protective film, whereas the dispersing effect of the polymer component inhibits agglomeration and deposit formation by smaller particles. In this way the carburetor and the inflow and outflow of the cylinders are kept clean. *Id.* at p. 737. Hence, the sole use of PURADD FD–100 is in the manufacture of a formulated gasoline detergent. The imported product, however, already possesses all of the properties of a gasoline detergent in that it inhibits deposit formation and thus keeps the carburetor and the inflow and outflow of the cylinders clean.

In support of your argument that PURADD FD–100 cannot be used as an additive for gasoline, you submit the results of a "VW (volkswagen) Vasser Boxer Inlet Valve Sticking Test CEC F–16–T–96" which runs a Volkswagen 1.9 liter 44 kW water-cooled-boxer Otto engine of VW type 2 series three times through 13 cycles and allows it to cool down. If, at that time, the engine compression is less than 8 bar, then the inlet valve was sticking in the valve guide. PURADD FD–100 failed this test in the VW engine.

Issue:

Whether PURADD FD–100 is classified in heading 3811, HTSUS as a gasoline additive, and, if so, whether it is an antiknock preparation or a detergent.

Law and Analysis:

Merchandise imported into the U.S. is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context that requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs. In interpreting the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUSA. *See* T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

GRI 2(a) states "[A]ny reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article. * * *" GRI 2(b) requires that goods consisting of different materials be classified according to the principles of GRI 3. GRI 3(a) requires that amongst competing headings, the most specific heading be used, but headings which refer to part only of the goods are equally specific. GRI

3(b), provides that composite goods consisting of different materials or made up of different components, shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

The following HTSUS provisions are relevant to the classification of this product:

3811	Antiknock preparations, oxidation inhibitors, gum inhibitors, viscosity improvers, anti-corrosive preparations and other prepared additives, for mineral oils (including gasoline) or for other liquids used for the same purposes as mineral oils:
	Antiknock preparations:
* * * * * * *	
3811.19.00	Other [than based on lead compounds]
* * * * * * *	
3811.90.00	Other [than anti-knock preparations or additives for lubricating oil]
* * * * * * *	
3902	Polymers of propylene or of other olefins, in primary forms:
3902.20	Polyisobutylene:
3902.20.50	Other [than Elastomeric]

The EN to heading 3811, HTSUS, defines detergent additives for gasoline as "[P]reparations used to keep the carburetor and the inflow and outflow of the cylinders clean." EN 38.11, 2(d).

The EN to the Chapter Notes for chapter 39 state, in pertinent part, "[W]hen as a result of the addition of certain substances, the resultant products answer to the description in a more specific heading elsewhere in the Nomenclature, they are **excluded** from Chapter 39; this is, for example, the case with: * * * (b) Prepared additives for mineral oils (**Heading 38.11**)." ENs p. 597. In *Mitsui Petrochemicals v. United States*, 21 C.I.T. 882 (1997, Ct. Intl. Trade Lexis 110; slip op. 87–108), the court held that a copolymer of heading 3902 was more specifically described in heading 3811 where the **sole use** of the imported substance was as a viscosity improver. *Id.* at 887 (emphasis added). Thus, if heading 3811, HTSUS, describes the merchandise, it is specifically excluded from classification in heading of 3902, HTSUS, under the EN's to Chapter 39, p. 597.

Chapter note 2 to Chapter 39 excludes from classification within chapter 39, in pertinent part, the following:

> (d) Solutions (other than collodions) consisting of any of the products specified in headings 3901 to 3913 in volatile organic solvents when the weight of the solvent exceeds 50 percent of the weight of the solution (heading 3208); * * *

The commentor notes that subheading 3902.20, HTSUS, is an *eo nomine* provision for polyisobutylene (hereinafter "PIB") However, the imported product is not PIB. As such, heading 3902, HTSUS, describes part only of the imported product. There is nothing in the terms of the heading, subheading or legal notes that expands the legal language to include classification of a product consisting of a blend of PIB-amine and hydrocarbon solvents using GRI 1. While chapter note 2 to chapter 39 would not specifically exclude this blend from classification in the chapter, this does not mean that the instant merchandise is automatically included in heading 3902 using GRI 1. As a composite good, Puradd FD–100 can only be classified in heading 3902 using a GRI 3 analysis. Therefore, if the merchandise is classifiable in heading 3811, HTSUS, at GRI 1 or GRI 2, this is the more specific and correct classification for the product.

Heading 3811, HTSUS, is a principal use provision. The court in *E.M. Chemicals v. United States*, 20 C.I.T. 382, 923 F. Supp. 202 (1996) explained the application of principal use provisions thus:

> When applying a "principal use" provision, the Court must ascertain the class or kind of goods which are involved and decide whether the subject merchandise is a member of that class. See, *supra*, Additional US Rule of Interpretation 1 to the HTSUS. In determining the class or kind of goods, the Court examines factors which may include: (1) the general physical characteristics of the merchandise; (2) the expectation of the ultimate purchasers; (3) the channels of trade in which the merchandise moves; (4) the environment of the sale (e.g., the manner in which the merchandise is advertised and displayed); (5) the usage of the merchandise; (6) the economic practicality of so using the import; and (7) the recognition in the trade of this use. *United States v. Carborundum Co.*, 63 C.C.P.A. 98, 102, 536 F.2d 373, 377, cert. denied, 429 U.S. 979, 50

L. Ed. 2d 587, 97 S. Ct. 490 (1976); see also *Lenox Coll.*, 20 C.I.T., Slip Op. 96–30, at page 5.

Applying the *Carborundum* factors above, a formulated preparation containing PIB amine and paraffinic solvent has the general physical characteristics of a gasoline detergent additive preparation in that it is a preparation used to keep the carburetor and the inflow and outflow of the cylinders clean. The merchandise performs the cleaning function by coating the fuel inlet system, making it less amenable to deposit build-up. (See *Ullmanns, supra*). The fact that the preparation coats the intake valve proves that the merchandise is performing as a detergent to keep the carburetor and the inflow and outflow of the cylinders clean. Although the addition of a carrier oil optimizes the merchandise for use over time, in very small engines, like that used in the Wasser-Boxer test, this does not change the imported product's basic formulation as a gasoline detergent preparation consisting of the active ingredient, PIB amine.

Moreover, the ultimate purchaser, gasoline suppliers, expect that the product will perform as a gasoline detergent in their gasoline. No evidence has been submitted that proves that the imported product could not perform as a gasoline detergent in the U.S. under EPA guidelines. Gasoline detergents move through blending plants to gasoline suppliers as does the instant merchandise. The merchandise, once fully blended, is tested and advertised as a gasoline detergent. PIB amine formulations are recognized and used as gasoline detergents. Furthermore, the **sole use** for the imported PIB amine gasoline detergent is in the formulation of a gasoline additive. (See Mitsui, *supra*). Hence, the merchandise belongs to the class or kind of goods that are principally used as fuel additives and are therefore classifiable in heading 3811 using GRI 1.

Alternatively, Puradd FD–100 is an unfinished product and can not be classified using GRI 1. Using GRI 2(a), the merchandise contains the essential character of a gasoline detergent in that it keeps the carburetor and the inflow and outflow of the cylinders clean by coating the engine and inhibiting deposit formation. Therefore, the merchandise is more specifically described in heading 3811, HTSUS, and excluded from classification in Chapter 39 using GRI 2(a).

The commentor cites the case of *Peter J. Schweitzer Division, Kimberly-Clark Corporation v. United States*, 57 Cust. Ct. 9, CD 2711 (1966), aff'd, 54 CCPA 44, C.A.D. 902 (1967), for the proposition that imported articles are classified in their condition as imported. On this we agree. In *Schweitzer*, the court disallowed classification of "flax straw" in the provision for "flax * * * fibers to be used in paper making," because the separation of the fibers from the straw occurred after importation. The analogy to Puradd FD–100 is specious. Puradd FD–100 is not simply PIB, nor is it PIB amine, both arguably classifiable in heading 3902, HTSUS, as "[P]olymers of propylene or of other olefins, in primary forms." Puradd FD–100 is a formulated product containing PIB amine and solvent, and already contains the necessary ingredients to coat the engine thus keeping the carburetor and the inflow and outflow of the cylinders clean. Nothing is being separated from the imported product after importation in the production of the final formulation of gasoline detergent. The already formulated gasoline detergent additive is simply being optimized by the addition of carrier oil, anti-corrosives and other agents for better engine performance. The imported substance already belongs to the class or kind of goods that are principally used as "prepared additives for mineral oils," specifically, gasoline detergent additives.

At GRI 6, between subheadings 3811.19.00, HTSUS, the provision for antiknock preparations, and subheading 3811.90.00, HTSUS, the provision for other gasoline additives, the merchandise is classified in subheading 3811.90.00, HTSUS, because it is formulated for use as a detergent additive for gasoline rather than as an antiknock preparation.

Holding:

PURADD-FD–100, previously known as Pluradyne FD–100, is classified at GRI 1 in subheading 3811.90.00, the provision for "[A]ntiknock preparations, oxidation inhibitors, gum inhibitors, viscosity improvers, anti-corrosive preparations and other prepared additives, for mineral oils (including gasoline) or for other liquids used for the same purposes as mineral oils: [O]ther."

Effect on Other Rulings:

HQ 956585 is revoked.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

PROPOSED MODIFICATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF ARM COVERS

AGENCY: U.S. Customs Service; Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter and revocation of treatment relating to the classification of arm covers.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182,107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling letter relating to the tariff classification, under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of arm covers. Similarly, Customs proposes to revoke any treatment previously accorded by it to substantially identical merchandise that is contrary to the position set forth in this notice. Comments are invited on the correctness of the intended actions.

DATE: Comments must be received on or before August 10, 2001.

ADDRESS: Written comments are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be inspected at the same location during regular business hours.

FOR FURTHER INFORMATION CONTACT: Joe Shankle, Textiles Branch: (202) 927–2379.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act

of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to modify a ruling relating to the tariff classification of arm covers and a belt that are classified with a sleeveless pullover as a composite good. Although in this notice Customs is specifically referring to the modification of New York Ruling Letter (NY) D88910, dated March 26, 1999, (attachment A); this notice covers any rulings on this merchandise which may exist but have not been specifically identified that are contrary to the position set forth in this notice. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical merchandise that is contrary to the position set forth in this notice. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUSA. Any person involved with substantially identical merchandise should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical merchandise or of a specific ruling not identified in this notice that is contrary to the position set forth in this notice, may raise issues of reasonable care on the part of the importer or their agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

Customs previously classified arm covers constructed of knit fabric consisting of 85% cotton and 15% spandex, under heading 6307, HTSUSA, which provides, in pertinent part, for other textile articles. Based on our analysis of the scope of the terms of headings 6117 and 6307, HTSUSA, the Legal Notes, and the Explanatory Notes, arm covers of the type discussed herein, are classifiable as clothing accessories under subheading 6117.80.9510, HTSUSA, which provides for, among other things, "Other made up clothing accessories, knitted or crocheted: knitted or crocheted parts of garments or of clothing accessories: Other accessories: Other: Other * * * Of cotton." Our analysis also sets forth that the three items, i.e., arm covers, waist belt, and sleeveless pullover form a composite good.

Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to modify NY D88910 and any other ruling not specifically identified, that is contrary to the position set forth in this notice, to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed HQ 963874 (attachment B). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions that are contrary to the position set forth in this notice. Before taking this action, consideration will be given to any written comments timely received.

Dated: June 26, 2001.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, March 26, 1999.

CLA–2–61:RR:NC:3:353 D88910
Category: Classification
Tariff No. 6117.80.9510, 6117.80.9520,
6110.20.2075, and 6307.90.9989

MR. HENRY TORAY
SPEED SOURCING, INC.
2140 City Gate Dr.
Columbus, OH 43219

Re: The tariff classification of knit waist belts from China and Madagascar, a pullover from Hong Kong and arm warmers from China and Madagascar.

DEAR MR. TORAY:

In your letter dated March 3, 1999 you requested a classification ruling.

Three samples were submitted with your request, Styles 7004C, 0637C and 9405099. Style 7004C is a knit fabric waist belt consisting of 85% cotton/15% spandex fabric. It is a tube-like design 4.5 inches wide, with a snap button pocket and ribbed at the top and bottom. Style 9405099 is a ladies sleeveless knit pullover consisting of 80% cotton/18% nylon and 2% spandex fabric. The pullover has no front or back opening, a crewneck, and falls at or above the waist with a ribbed bottom. Style 0637C are ladies arm warmers consisting of knit 85% cotton/15% spandex fabric. The items are tube-like from forearm to bicep with ribbed ends. You also request classification for Styles 700M and 0637M, of which no samples were submitted. Style 700M a ladies knit 100% cashmere waist belt designed identical to Style 700C and Style 0637M are ladies arm warmers consisting of knit 100% cashmere fabric designed identical to Style 0637C.

The United States Customs Service will retain the sample of the ladies pullover, Style 9405099. All other samples will be returned to you as requested.

The applicable subheading for the waist belt, Style 7004C will be 6117.80.9510, Harmonized Tariff Schedule of the United States (HTS), which provides for "Other made up clothing accessories, knitted or crocheted; knitted or crocheted parts of garments or of clothing accessories: Other accessories: Other: Other, Of cotton." The duty rate will be 15% ad valorem.

The applicable subheading for the waist belt, Style 700M will be 6117.809520, Harmonized Tariff Schedule of the United States (HTS), which provides for "Other made up clothing accessories, knitted or crocheted; * * *: Other accessories: Other: Other, Of wool or fine animal hair." The duty rate will be 15% ad valorem.

The applicable subheading for the pullover, Style 9405099 will be 6110.20.2075, Harmonized Tariff Schedule of the United States (HTS), which provides for "Sweaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted: Of cotton: Other, Other: Other: Women's or girls'." The duty rate will be 18.6% ad valorem.

The applicable subheading for the arm warmers, Styles 0637C and 0637M will be 6307.90.9989, Harmonized Tariff Schedule of the United States (HTS), which provides for "Other made up articles, including dress patterns: Other: Other: Other, Other." The duty rate will be 7% ad valorem.

Style 7004C falls within textile category designation 359. Based upon international textile trade agreements products of China are subject to quota and the requirement of a visa.

Style 9405099 falls within textile category designation 339. Based upon international textile trade agreements products of Hong Kong are subject to quota and the requirement of a visa.

Currently there is not any textile quota and/or requirement of visa from Madagascar.

The designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes. To obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Kenneth Reidlinger at 212–637–7084.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:TE 963874 JFS
Category: Classification
Tariff No. 6110.20.2075, HTSUSA

MR. HENRY TORAY
SPEED SOURCING, INC.
2140 City Gate Dr.
Columbus, OH 43219

Re: Modification of NY D88910; Classification of Arm Covers; Clothing Accessories; Composite Good.

DEAR MR. TORAY:

This letter is to inform you that Customs has reconsidered New York Ruling Letter (NY) D88910, issued to you on March 26, 1999, concerning the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of a knit waist belt, pullover, and arm covers. After review of that ruling, it has been determined that the classification of the arm covers in subheading 6307.90.9989, HTSUSA, was incorrect. In addition, the three articles from a composite good, which changes the classification of the waist belt as well. For the reasons that follow, this ruling modifies NY D88910.

Facts:

In NY D88910, Customs classified the arm covers at issue in heading 6307, HTSUSA, which is a residual basket provision for textile articles. The arm covers, a knit fabric waist belt, and a ladies sleeveless knit pullover, were all imported together. The three items are sold and marketed as a "make your own outfit." They are designed so that the buyer can wear the pullover by itself, with the arm covers, with the waist belt, or with the arm covers and the waist belt. The items do not attach to one another by any means. All three items are composed of knit fabric consisting of 85% cotton and 15% spandex.

The waist belt (Style 7004C) is a tube-like design, is 4-1/2 inches wide, has a snap button pocket and is ribbed at the top and bottom.

The sleeveless pullover (Style 9405099) has no front or back opening, has a crewneck, falls at or above the waist, and has a ribbed bottom.

The arm covers (Style 0637C) are tube shaped, and cover the arm. They have ribbed ends to secure them to the wearer's arms.

Issue:

Should the arm covers be classified under heading 6117, HTSUSA, HTSUSA, as clothing accessories, or under heading 6307, HTSUSA, as other made up textile articles?

Law and Analysis:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied.

The Harmonized Commodity Description and Coding System, Explanatory Notes (EN), represent the official interpretation of the Harmonized System at the international level (for the 4 digit headings and the 6 digit subheadings) and facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI. The EN, although not dispositive or legally binding, provide a commentary on the scope of each heading of the HTSUS, and are generally indicative of the proper interpretation of these headings. See T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

Heading 6117, HTSUSA, provides for "Other made up clothing accessories, knitted or crocheted; knitted or crocheted parts of garments or of clothing accessories." The term "accessory" is not defined in the tariff schedule or EN. Webster's New Collegiate Dictionary, (1977), defines "accessory" as a thing of secondary or subordinate importance or an object or device not essential in itself but adding to the beauty, convenience, or effectiveness of something else. In Headquarters Ruling Letter (HQ) 088540, dated June 3, 1991, Customs defined an accessory as an article that is related to the primary article, and intended for use solely or principally as an accessory. In heading 6117, HTSUSA, the accessories classifiable under this provision will be related to clothing, intended for use with clothing and of secondary importance to clothing. HQ 950470, dated January 7, 1992.

The alternative heading, 6307, HTSUSA, provides for other made up textile articles. This is not a true alternative in that heading 6307 is a "basket" provision intended to classify merchandise not provided for more specifically in other headings of the tariff. Accordingly, we must first determine whether classification is proper under heading 6117, HTSUSA, as clothing accessories. If not, we will address whether classification is proper under heading 6307, HTSUSA.

The EN to 6117, HTSUSA, and 6307, HTSUSA, both provide examples of articles that have similar characteristics as the arm covers under consideration. EN (6) to heading 6117, HTSUSA, lists sleeve protectors as being covered by the heading. Sleeve protectors are similar to arm covers in that they also provide protection for the arms. See HQ 961080, dated September 14, 1999 (ruling that polyurethane coated sleeve protectors that protect workers from animal fats and chemicals are clothing accessories); see also, HQ 961108 dated September 2, 1999; and HQ 961737, dated December 8, 1998.

The function of the arm cover is of primary importance when determining whether to classify it as a clothing accessory under 6117, HTSUSA. If the arm cover has a function completely divorced from any use with clothing and does not add to the beauty, convenience, or effectiveness, of clothing, it will not be considered a clothing accessory. HQ 952005, dated August 26, 1992.

In HQ 950659, Customs considered whether to classify arm covers that are similar to those now under consideration as clothing accessories. In that ruling, Customs revoked

HQ 086378, dated April 9, 1990, that had classified arm covers as clothing accessories under heading 6117, HTSUSA. Customs reclassified the arm covers under the basket provision of 6307, HTSUSA. The arm covers were described as:

> [T]ubular shaped items made of 43% angora, 18% lambswool, 26% polyamid and 13% elasthan which forms a fabric of a weft knit construction. They are specially designed to fit certain body parts, i.e., wrists, elbows, knees and backs. The articles are intended for use by people afflicted with arthritis or rheumatism. The primary purpose of these articles appears to be the maintenance of localized warmth, which in turn would provide greater comfort to the wearer. The wool and angora components also act to absorb perspiration and the elasticity of the items may in some cases provide support.

In making its decision to rescind its prior ruling, Customs considered whether the arm covers had a logical nexus with clothing. That is, did they either add to the clothing's (1) beauty, (2) convenience, or (3) effectiveness? Customs examined the function and use of the arm covers and concluded that the arm covers could not be considered clothing accessories because they did not satisfy any of the three requirements.

Applying these principles to the instant arm covers, Customs concludes that they are properly classifiable as clothing accessories. The arm covers satisfy all three of the requirements for clothing accessories, i.e., adding to clothing's beauty, convenience and effectiveness. The arm covers are composed of nearly identical fabric as the pullover; thus, the wearer is able to alter her clothing to suit her fashion needs. Moreover, the arm covers enable the wearer to conveniently and easily convert the sleeveless pullover into a long sleeved pull over, or vice versa, depending on the weather; thus, enhancing the convenience and effectiveness of the pullover.

For a similar ruling, see HQ 963734, dated March 28, 2001. In that ruling, Customs classified similar arm warmers as clothing accessories under heading 6117, HTSUSA. In HQ 963734, the arm warmers were designed to be worn with any short sleeved shirt. They were intended to be used by golfers and other sportsmen so that they could convert their regular short sleeved shirt into a long sleeved shirt and back again, depending on the weather.

The arm covers now under consideration are distinguishable from arm covers that have previously been classified by Customs as not being clothing accessories. See HQ 952005, dated August 26, 1992 (merino wool arm cover intended to be used for therapeutic purposes is not a clothing accessory); HQ 950470, dated January 7, 1992 (arm cover composed of neoprene rubber, and designed to retain heat for the treatment of arthritis and sporting injuries, is not a clothing accessory); HQ 954342, dated September 10, 1993 (wool arm covers designed to keep muscles and joints warm to reduce the discomfort associated with rheumatism and arthritis, are not clothing accessories). The arm covers in those rulings are distinguishable from those now under consideration, because they have no logical nexus with clothing. Instead they are wholly independent and separate from any items of clothing. Their function is to serve a therapeutic or medicinal purpose by fitting tightly over the arm thereby providing warmth and support. In contrast, the arm covers that are the subject of this ruling are not only clothing accessories, but they also have no medicinal or therapeutic purpose.

The arm covers are accessories to the sleeveless pullover and are properly classifiable at GRI 1 under heading 6117, HTSUSA. For a similar ruling, see HQ 963734, dated March 28, 2001.

The arm covers are imported, packaged, and sold along with the waist belt and sleeveless pullover. Therefore, it is necessary to consider classification of them in light of their relation to the waist belt and pullover.

Note 13, Section XI, provides:

> Unless the context otherwise requires, textile garments of different headings are to be classified in their own headings even if put up in sets for retail sale. For the purposes of this note, the expression *"textile garments"* means garments of headings 6101 to 6114
> * * *

Because the arm covers and waist belt are clothing accessories under heading 6117, HTSUSA, they are not "textile garments" for the purposes of note 13 to Section XI. The requirement that they be classified in their own heading is not applicable. See HQ 084796, dated September 5, 1989.

The combination of the sleeveless pullover, arm covers, and waist belt meet the definition of composite goods set out in the EN. The EN define composite goods as follows:

> [C]omposite goods made up of different components shall be taken to mean not only those in which the components are attached to each other to form a practically insepa-

> rable whole but also those with separable components, provided these components are adapted one to the other and are mutually complementary and that together they form a whole which would not normally be offered for sale in separate parts.

The arm covers and waist belt are adapted to, and are mutually complementary to the sleeveless pullover, as well as to each other. They are designed, sold and marketed as a "make your own" outfit. All three items are made up of the same textile material and they are specially fitted to be worn together. They form a whole that would not normally be offered for sale separately. The waist belt and arm covers are dependent upon the sleeveless pullover to lend them any sort of functionality.

Following GRI 3(a), when two or more headings refer to only part of composite goods, the headings are equally specific, and classification must be determined by GRI 3(b). GRI 3(b) provides for classification based upon that component which gives the composite good its essential character. In this case, the sleeveless pullover is that component. The sleeveless pullover may be worn with or without the arm covers and the waist belt, which are accessories to the sleeveless pullover. The arm covers are used to convert the sleeveless pullover into a long sleeved garment. Likewise, the waist belt is used to alter the pullover such that it extends further down the torso. The arm covers and waist belt are accessories to the pullover, which imparts the essential character of the composite good.

Accordingly, the arm covers and waist belt are classified with the sleeveless pullover under subheading 6110.20.2075, HTSUSA.

Holding:

The arm covers are classified under subheading 6110.20.2075, HTSUSA, textile category 339, which provides for "Sweaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted: Of cotton: Other, Other: Other: Women's or Girls'. The general column one rate of duty is 17.8% percent *ad valorem*.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent negotiations and changes, we suggest that you check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an issuance of the U.S. Customs Service, which is updated weekly and is available at the local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact the local Customs office prior to importing the merchandise to determine the current status of any import restraints or requirements.

JOHN DURANT,
Director,
Commercial Rulings Division.

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO THE CLASSIFICATION OF BOY'S KNIT GARMENT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of a tariff classification ruling and treatment relating to the classification of boy's knit garment.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub.L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling letter relating to the tariff classification of a boy's knit garment under the Harmonized Tariff Schedule of the United States (HTSUS), and any treatment previously accorded by the Customs Service to substantially identical merchandise. Notice of the proposed revocation was published in the CUSTOMS BULLETIN on January 3, 2001, Vol. 35, No. 1. One comment was received.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after September 10, 2001.

FOR FURTHER INFORMATION CONTACT: Ann Segura Minardi, Textile Branch, (202) 927–2380.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub.L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. section 1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(1)), a notice was published in the CUSTOMS BULLETIN on

January 3, 2001, proposing to revoke a ruling letter pertaining to the tariff classification of a boy's knit garment. One comments was received.

In NY E84339, dated July 16, 1999, Customs ruled that the subject garment, Style # NW–5114 (sizes 8–20) was properly classified under subheading 6110.30.3050, HTSUSA, which provides for "Sweaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted: of man-made fibers: Other: Other: Other: Other: men's or boys'." Since the issuance of this ruling, Customs has reviewed the classification of this item and has determined that the cited ruling is in error. We have determined that Style # NW–5114(sizes 8–20) is correctly classified in subheading 6101.30.2020, HTSUSA, which provides for "Men's or boys' overcoats, carcoats, capes, cloaks, anoraks (including ski-jackets), windbreakers and similar articles, knitted or crocheted, other than those of heading 6103: Of man-made fibers: Other: Other, boys'."

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking NY E84339, and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letter HQ 963439 (see "Attachment" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by the Customs Service to substantially identical merchandise.

One comment was received regarding the proposed revocation of NY E84339, which requested clarification on the following points: "1. whether the requirement for some means of tightening at the waist is being eliminated; 2. whether the change in treatment is limited to garments is(sic) boys' sizes; 3. whether the change is limited to knit garments with woven overlays; and, 4. clarification of the term, "dense fabric."

First, it is not our intention to eliminate from the *Guidelines for the Reporting of Imported Products in Various Textile and Apparel Categories* (Textile Guidelines), C.I.E. 13/88, November 23, 1988, the criteria which establishes that jackets often have a drawstring, elastic or rib-knit waistband. Rather, HQ 963439, notes that the subject garment meets four of the eleven "jacket" criteria contained in the Textile Guidelines. The fact that it lacks a tightening element at the waist does not preclude applicability of the ten remaining criteria. Since more than three criteria have been met and because the result is not unreasonable, the subject garment is correctly classified in subheading 6101.30.2020, HTSUSA, which provides for "Men's or boys' overcoats, carcoats, capes, cloaks, anoraks (including ski-jackets), windbreakers and similar articles, knitted or crocheted, other than those of heading 6103: Of man-made fibers: Other: Other, boys'."

Second, the Textile Guidelines do not make a distinction based on the size of the garment or the intended age of the wearer. Nor have we made such a distinction in HQ 963439. Rather, based on the features present-

ed on this specific garment, Customs has applied the criteria contained in the Textile Guidelines and determined that the subject article is a jacket classifiable in subheading 6101.30.2020, HTSUSA, regardless of the age of the wearer.

Third, the classification determination contained in HQ 963439 is, of course, based on a specific set of features which make up the subject garment. In this instance, because the woven panels were determined to be an integral component of the garment, the presence of the woven overlays combined with a knit fabric required Customs to first consider the classification guidelines set forth in Customs Headquarters Memorandum 084118, dated April 13, 1989. Accordingly, a GRI 3(b) analysis was applied and we determined that the knit fabric gave the article its essential character. Thus, the garment is properly classified in a knitwear provision. However, the woven overlays were also significant in the final analysis when Customs determined that the subject garment was suitable for use as a jacket to provide the outermost layer of warmth and protection against the elements. As such, while HQ 963439 may have some application to the classification of knit garments that do not have woven overlays, it should also be noted that in classifying the subject article as a "jacket", our final determination was based on a consideration of all the features of the subject article.

Fourth, in using the term "dense fabric" to describe the knit fabric of which this garment is constructed, we are identifying a fabric that has a raised nap wherein the nap is closely packed. Such fabric promotes warmth and protection from the elements.

As stated in the proposed notice, this revocation will cover any rulings on this issue which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the issue subject to this notice, should have advised Customs during the notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, have been the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations involving the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should have advised Customs during the comment period. An importer's failure to advise Customs of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: June 25, 2001.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, June 25, 2001.

CLA–2 RR:CR:TE 963439 ASM
Category: Classification
Tariff No. 6101.30.2020

MR. JOHN IMBROGULIO
NORDSTROM INC.
1617 Sixth Ave., Suite 1000
Seattle, WA 98101

Re: Revocation of NY E84339: Boy's knit garment.

DEAR MR. IMBROGULIO:

This is in regard to your letter, dated September 28, 1999, requesting reconsideration of NY E83097 and NY E84339 which classified boys' knit garments under the Harmonized Tariff Schedule of the United States Annotated. We have reviewed New York Ruling Letter (NY) E84339, issued to you on July 16, 1999, and determined that the classification provided for this merchandise is incorrect. This ruling revokes NY E84339 by providing the correct classification.

Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), notice of the proposed revocation of NY E84339 was published on January 3, 2001, in the CUSTOMS BULLETIN, Volume 35, Number 1. One comment was received.

Facts:

The rulings at issue are NY E83097, dated July 7, 1999, and NY E84339, dated July 16, 1999. These rulings involved two separate classifications for a boy's knit garment, identical in every respect, except for the size range. In NY E83097, the subject article was identified as Style # NK–5114, sizes 4–7. In NY E84339 the subject garment was identified as Style # NW–5114, sizes 8–20. The garment is a boy's jacket, constructed from 100 percent polyester, finely knit fabric that is napped on the inside and outside surfaces. The garment has the following features: a stand-up collar with nylon overlays; a full front opening with a heavy duty zippered closure; long sleeves with elasticized capping at the cuffs; a heavy duty zippered pocket on the left chest; two heavy duty zippered pockets below the waist; nylon overlays on the front and back yokes and on the outer portion of each sleeve; and a straight, hemmed bottom. The polyester fleece fabric, which completes the shell, has a dense pile.

In NY E83097, the garment (NK–5114, sizes 4–7) was classified in subheading 6101.30.2020, HTSUSA, which provides for "Men's or boys' overcoats, carcoats, capes, cloaks, anoraks (including ski-jackets), windbreakers and similar articles, knitted or crocheted, other than those of heading 6103: Of man-made fibers: Other: Other, boys'."

In NY E84339, the garment (NW–5114, sizes 8–20) was classified under subheading 6110.30.3050, HTSUSA, which provides for "Sweaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted: of man-made fibers: Other: Other: Other: Other: men's or boys'."

You disagree with the classification of Style # NK–5114 as a boy's outerwear garment in heading 6101, HTSUSA, and assert that it should be classified the same as Style # NW–5114 because it is identical in every respect except for the size range. You further assert that the Guidelines for the Reporting of Imported Products in Various Textile and Apparel Categories, C.I.E. 13/88, November 23, 1988, as well as previous binding rulings indicate that knit garments without a tightening at the wrist or waist would not be considered a jacket. Thus, it is your assertion that both Style # NK–5114 and Style # NW–5114 should be classified as "other garments" in subheading 6110.30.3050, HTSUSA.

Issue:

What is the proper classification for the merchandise?

Law and Analysis:

Classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the heading and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI. The EN, although not dispositive, are used to determine the proper interpretation of the HTSUSA by providing a commentary on the scope of each heading of the HTSUSA. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The instant garment consists of an outer shell of both knit and woven fabrics. As such, GRI 2(b) states that goods consisting of more than one material are to be classified according to GRI 3. GRI 3(a) states that the heading which provides the most specific description is to be preferred to the one that is more general. However, in this instance, when two headings each refer to only part of the materials in mixed goods, the headings are to be regarded as equally specific. Consequently, goods which are not classifiable under 3(a) are analyzed as per GRI 3(b) which directs that the goods be classified as if they consisted of the material which gives them their essential character.

As we noted in Headquarters Ruling (HQ) 958288, dated November 29, 1995, "Usually, when Customs is faced with the classification of a garment that is comprised of a woven material and knit, we refer to a set of classification guidelines set forth in Customs Headquarters Memorandum 084118 (Customs Memorandum), dated April 13, 1989" in order to determine the essential character of a garment. In this ruling, it was determined that the woven panels overlaying the knit fabric were mere decorative trim more similar to an "accessory" to the garment within the meaning of the EN to Chapter 61. The ruling further stated that if the woven panels had been viewed as an integral component of the garment, a GRI 3 analysis would be appropriate and the guidelines contained in the Customs Memorandum applied. However, as mere decorative trim, the woven panels were disregarded and the entire article was classified as a knit garment pursuant to a GRI 1 analysis. *See,* also HQ 950007, dated October 4, 1991.

In the subject case, we note that the woven fabric overlay does provide a decorative accent. However, we further note that there is a significant amount of the woven fabric used on the upper portion of the front, back, arms, and collar of the garment. Furthermore, the woven overlays are strategically placed at the neck and upper body to provide additional protection to the wearer. As such, it is our determination that the woven overlays are an integral component of the garment, a GRI 3 analysis is appropriate, and the guidelines contained in the Customs Memorandum should be applied to determine the essential character.

In determining the essential character of the subject garment which consists of both knit and woven fabrics, the Customs Memorandum has set forth the criteria for an upper body garment as follows:

> a. For upper or lower body garments, if one component exceeds 60 percent of the visible surface area, that component will determine the classification of the garment unless the other component:
>
> (1) forms the entire front of the garment; or
>
> (2) provides a visual and significant decorative effect (e.g. a substantial amount of lace); or

(3) is over 50 percent by weight of the garment; or
(4) is valued at more than 10 times the primary component.

If no one component comprises 60 percent of the visible surface area, or if any of the above four listed conditions are present, classification will be according to GRI 3(b) or 3(c), as appropriate.

In the subject case, the polyester knit fabric appears to comprise approximately 60 percent of the visible surface area. However, the woven nylon fabric overlays do provide visual contrast to the front, back, and arms of the garment, imparting a significant decorative effect to the overall appearance of the garment. Thus, in assessing the essential character of the goods pursuant to GRI 3(b), it is our determination that the knit fabric which has been napped on both the inside and outside surfaces, gives the garment its essential character because it comprises the greatest total surface area of the article. Although the woven nylon fabric provides a fashionable accent and some additional protection to the surface area, it is the napped fabric that imparts the greatest visual impact to the garment while also conveying the important features of warmth and a softly textured surface over the greater portion of the surface area.

Customs has previously ruled that certain knit garments that resemble jackets are properly classifiable as "sweaters", "pullovers", and "other garments" under subheading 6101.30.3050, HTSUSA. *See* HQ 956795, dated January 25, 1995; HQ 950045, dated December 3, 1991; HQ 951629, dated August 21, 1992; HQ 954827, dated December 8, 1993. However, these rulings did not involve the classification of a knit garment, such as the one at issue, which combine all the following outerwear features: a heavy duty full frontal zipper, stand up collar, a heavy duty zippered pocket on the left chest, two pockets below the waist with heavy duty zipper, and long sleeves with elasticized capping at the cuffs. In particular, HQ 956795, dated January 25, 1995, best illustrates this point. HQ 956795, determined that a man's long sleeved upper body garment constructed of 100 percent knit polyester, heavily napped on both the inside and outside surfaces would otherwise have been classifiable as a jacket under subheading 6101.30.2010, HTSUSA, if it had been designed with a full frontal zipper opening. To support this statement, the ruling cited to HQ 088289, dated February 11, 1991, in which Customs distinguished between sweatshirts classifiable under heading 6110, HTSUSA, and sweatshirts with full frontal zippers held classifiable as jackets of heading 6101, HTSUSA. In classifying a long sleeve sweatshirt jacket with a full front zipper opening as a jacket of heading 6101, HTSUSA, HQ 088289, stated that "Garments with full-front zipper openings are not considered similar to sweatshirts, but are jackets."

The *Guidelines for the Reporting of Imported Products in Various Textile and Apparel Categories*, C.I.E. 13/88, November 23, 1988 (Textile Guidelines) set forth eleven criteria by which to classify a garment as a jacket under the HTSUSA, if the result is not unreasonable. In applying these Textile Guidelines, HQ 962593, dated December 2, 1999, concluded that a garment constructed from fabric napped only on the inside, with full front zippered opening, long sleeves with rib knit cuffs, pockets below the waist, and a straight hemmed bottom was classifiable as a cardigan in heading 6110, HTSUSA. This ruling stated that, although the garment possessed three "jacket features", it was not designed as a "jacket" for use over other outer wear. The ruling further stated:

> Specifically, although we recognize that fabric weight is not an absolute indicator of a garment's status for classification purposes, it does provide some indication as to a garment's suitability for different uses. In this case, the lightweight fabric construction of the subject garment would not likely provide sufficient protection from the elements to the wearer when worn outside on cold days. Additionally, features such as pockets at the waist and a hood, are not substantive proof that a garment is designed for use as outerwear.

In the subject case, the garment possesses at least four of the eleven jacket features enumerated in the Textile Guidelines as follows: 1) pockets at or below the waist; 2) a heavy duty zipper; 3) long sleeves without cuffs; 4) an elasticized binding at the wrist. Unlike the garment in HQ 962593, the garment now in question is clearly designed for use as outerwear. The subject garment is comprised of a dense fabric that is napped on both the inside and outside surfaces suggesting that it is to be used for warmth. It is also important to note that the tightly woven nylon fabric overlays are strategically placed to offer additional protection against the elements: On the outside of the stand-up collar, extending across the shoulders, across the chest and back area of the garment, and along the outside of each sleeve from shoulder to cuff. Thus, when one considers in totality, all of these features com-

PAGE 62 IS MISSING IN NUMBER ONLY.

United States Court of International Trade

One Federal Plaza
New York, N.Y. 10278

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa A. Ridgway
Richard K. Eaton

Senior Judges

James L. Watson
Herbert N. Maletz
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Clerk

Leo M. Gordon

Decisions of the United States Court of International Trade

(Slip Op. 01–74)

NEENAH FOUNDRY CO., ALHAMBRA FOUNDRY INC., ALLEGHENY FOUNDRY CO., DEETER FOUNDRY INC., EAST JORDAN IRON WORKS, INC., LEBARON FOUNDRY INC., MUNICIPAL CASTINGS, INC., AND U.S. FOUNDRY & MANUFACTURING CO., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 99–07–00441

[ITA final results of redetermination pursuant to court remand affirmed.]

(Decided June 20, 2001)

Collier Shannon Scott, PLLC (Paul C. Rosenthal and *Robin H. Gilbert)* for the plaintiffs.
Stuart E. Schiffer, Acting Assistant Attorney General; *David M. Cohen,* Director, and *Velta A. Melnbrencis,* Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; and Office of Chief Counsel for Import Administration, U.S. Department of Commerce *(Robert E. Nielsen),* of counsel, for the defendant.

MEMORANDUM

AQUILINO, *Judge:* This court's slip opinion 01–37, 25 CIT ____, ____ F.Supp.2d ____ (April 2, 2001), familiarity with which is presumed, denied plaintiffs' motion for judgment herein upon the record compiled by the International Trade Administration, U.S. Department of Commerce ("ITA") *sub nom. Final Results of Expedited Sunset Review: Iron Metal Castings From India,* 64 Fed.Reg. 30,316 (June 7, 1999), amended, 64 Fed.Reg. 37,509 (July 12, 1999), except for remand to that agency

> for *reconsideration* of the subtraction of IPRS from the net countervailable subsidy without having considered the method of that program's alleged termination or the likelihood of its reinstatement in the absence of any prior administrative determination of that issue.[1]

The defendant has now duly filed its *Final Results of Redetermination Pursuant to Court Remand* (May 25, 2001), the summary of which on page 1 thereof is that

> we have reconsidered the exclusion of the IPRS from the net countervailable subsidy, by considering the method by which the IPRS

[1] Slip Op. 01–37, pp. 39–40 (emphasis added). The acronym *IPRS* derives from India's International Price Reimbursement Scheme.

> program was terminated and the likelihood of its reinstatement in the absence of any prior administrative determination of this issue. Based on our reconsideration in accordance with the Court's instructions, we continue to find that the IPRS program has been terminated and continue to exclude it from the net countervailable subsidy.

Footnotes omitted. This conclusion draws upon the premise that

> it is reasonable to conclude that when a program is initiated through the action of a government agency, it is rational to expect that that program would also be eliminated through agency action, rather than by legislative action.

Final Results, p. 7. Furthermore,

> evidence indicating that a significant period of time had passed since the elimination of a program, without that program being reinstituted, provides a strong basis for concluding that the government is not likely to reinstate the program. * * * [I]n this case, Commerce has found no evidence in administrative reviews conducted for periods subsequent to the effective date of the elimination of the IPRS program that the IPRS program has been re-instituted.

Id. at 8.

I

The statutory standard governing judicial review of this case continues to be that any determination is unlawful if found to be arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law. 19 U.S.C. §1516a(b)(1)(B)(ii) (1995). *See* 19 U.S.C. §1516a(a)(1)(D) (1995); Slip Op. 01–37, pp. 6–7, 25 CIT at ____, ____ F.Supp.2d at ____.

The plaintiffs renew the pursuit of relief under this standard, arguing now that, for the ITA

> to make a finding of termination in this remand determination, Commerce would have to be able to find that, during a proceeding in which this issue was addressed on the merits and plaintiffs were given an opportunity to comment on the evidence put forth by the Indian respondents (as well as submit any evidence of their own), Commerce had reached a formal determination of this issue.

Plaintiffs' Comments on Remand Results, p. 6 (June 5, 2001). They maintain that, if

> a respondent had claimed during an administrative review that the IPRS program was more than simply "not used," Commerce would have considered the issue on its merits, taken evidence from all parties to the review, and all information would be subject to verification. * * * Commerce has neither considered the issue on its merits before, nor has the domestic industry had any opportunity to present evidence of its own.

Id. at 7.

A

Procedurally, this position is tenuous, given the number of administrative reviews conducted prior hereto by the ITA under 19 U.S.C. §1675, and with the apparent, active participation of the plaintiffs herein therein. *See, e.g., Certain Iron-Metal Castings From India; Final Results and Partial Rescission of Countervailing Duty Administrative Review,* 63 Fed.Reg. 64,050, 64,051 (Nov. 18, 1998) (IPRS "not used" during 1996 period of review); *Certain Iron-Metal Castings From India; Final Results of Countervailing Duty Administrative Review,* 62 Fed.Reg. 32,297, 32,299 (June 13, 1997) (IPRS "not used" during 1994); *Certain Iron-Metal Castings From India: Final Results of Countervailing Duty Administrative Review,* 61 Fed.Reg. 64,676, 64,677 (Dec. 6, 1996) (IPRS "not used" during 1993 period of review); *Certain Iron-Metal Castings From India: Preliminary Results of Countervailing Duty Administrative Review,* 60 Fed.Reg. 44,839, 44,842 (Aug. 29, 1995) (IPRS "not used" during 1992). Indeed, at least two of these administrative reviews were stated to have been at the behest of the domestic producers, plaintiffs herein. *See Certain Iron Metal Castings From India: Preliminary Results of Countervailing Duty Administrative Review,* 61 Fed.Reg. 25,623 (May 22, 1996); *ibid.,* 60 Fed.Reg. at 44,839.

Moreover, prior to filing the *Final Results* now contested herein, the defendant moved this court for an extension of time within which to file on the stated ground that the ITA had

> decided that additional information would be helpful in resolving the [IPRS] issue. Commerce personnel will be traveling to India to conduct a verification with respect to another order beginning the week of May 14, 2001, and returning around June 4, 2001. During this time, the personnel will have an opportunity to verify whether the IPRS program has been terminated. Upon their return, Commerce will prepare a verification report which it will make available to the parties. They will then be given time to submit whatever comments they wish to make on the issue. After considering the comments, Commerce will reconsider whether the IPRS program has been terminated, the method of termination, and the likelihood of its reinstatement. Commerce anticipate[s] that it will be in a position to report the results of its reconsideration upon remand by June 29, 2001.[2]

The plaintiffs opposed this motion, arguing, among other things, that the ITA was precluded from reopening its administrative record, in part, because "it * * * would be directly contrary to Commerce's sunset regulations." Plaintiffs' Opposition to Defendant's Motion for Extension of Time to Complete Remand, p. 2, and citing 19 C.F.R. §351.218(e)(1)(ii)(C) (1999), to wit:

> *Inadequate response from respondent interested parties.* If the Secretary determines that respondent interested parties provided inadequate response to a notice of initiation * * *, the Secretary:

[2] Defendant's Motion for Extension of Time to Complete Remand, p. 2.

* * * * * * *

> (2) Normally will conduct an expedited sunset review and * * * issue, without further investigation, final results of review based on the facts available in accordance with §351.308(f) * * *.

Given the facts and circumstances of this case, the court concluded that this opposition to defendant's motion by the plaintiffs was well-taken, whereupon it was denied, and the *Final Results* were filed without further ado.

B

Now, the plaintiffs argue that those *Final Results* contain "no analysis, nor reasoned explanation, of whether [a] single document is sufficient evidence of [IPRS]'s termination for purposes of the sunset law." Plaintiffs' Comments on Remand Results, pp. 5–6. That is, the

> only fact supporting Commerce's determination is a self-serving statement from the Indian Ministry of Commerce saying the IPRS program was "withdrawn"—a statement placed in the record of an administrative review in which the issue of the program's termination was not raised, briefed, nor became the basis of a determination by Commerce.

Id. at 12. But the *Final Results* note at page 8 that this withdrawal occurred "prior to the [Uruguay Round Agreements Act] URAA effective date and several years before the November 1998 initiation of the sunset review of the CVD order on the iron-metal castings." In other words, the letter hardly issued in conjunction with this five-year review.

The plaintiffs also claim that "the record * * * does not support a finding that there is no likelihood of the IPRS program being reinstated"[3], stating that the ITA's "findings solely of 'non-use' over the life of this order as evidence that the IPRS has not been re-instituted" are insufficient to support its determination that the program is unlikely to be reinstated in the event of revocation. *Id.* at 14. They contend that it

> is of limited probative value in Commerce's analysis for it to look *only* for evidence of reinstatement after a program is allegedly terminated. * * * [E]ven though Commerce has found no evidence of reinstatement prior to the sunset review, that could just as well indicate that the Indian government is not so foolish as to reinstitute such a significant export subsidy just in time for it to be counted in a sunset subsidy rate projection.

Id. at 13 (emphasis in original).

In fact, this determination is consistent with others of the ITA. *See, e.g., Final Results of Expedited Sunset Review: Stainless Steel Wire Rod From Spain,* 65 Fed.Reg. 6,166, 6,169 (Feb. 8, 2000) (finding that subsidy programs are not likely to be reinstated based on "prior findings regarding the termination of [the programs] and * * * lack of evidence to the contrary"); *Final Results of Full Sunset Review: Live Swine From Canada,* 64 Fed.Reg. 60,301, 60,302–03 (Nov. 4, 1999) (finding four sub-

[3] Plaintiffs' Comments on Remand Results, p. 8.

sidy programs terminated with no likelihood of reinstatement where the ITA had not found any grounds for reconsideration of the programs or their termination in any administrative review since their termination).

The plaintiffs offer neither authority for the proposition that there is a "greater evidentiary burden"[4] for a finding of no likelihood of reinstatement nor an example of what would constitute satisfactory evidence in a case such as this. In the sunset review of the order covering live swine from Canada, *supra,* the court notes that the petitioners claimed that "the governments have demonstrated a pattern of eliminating and then replacing pork subsidy programs with new ones". *Preliminary Results of Full Sunset Review: Live Swine From Canada,* 64 Fed.Reg. 34,209, 34,210 (June 25, 1999). But the ITA found no likelihood of reinstatement because "the record does not indicate a connection between the programs that have been terminated and the new programs." *Id.* at 34,213.

Here, IPRS was not only "withdrawn" some five years before the sunset review at bar was initiated, it was "not used" for several years[5] prior thereto. *See Final Results,* Attachment 1; *Final Results of Countervailing Duty Administrative Review: Certain Iron-Metal Castings From India,* 56 Fed.Reg. 52,521, 52,527 (Oct. 21, 1991) ("we verified in the 1987 review that the Government of India officially terminated the IPRS program with respect to exports of the subject merchandise to the United States"); *Certain Iron-Metal Castings From India; Final Results of Countervailing Duty Administrative Review,* 55 Fed.Reg. 50,747, 50,750 (Dec. 10, 1990) ("At verification, we established that the EEPC stopped accepting any IPRS claims filed on shipments of the subject merchandise exported to the United States after July 1, 1987"). As stated by the ITA,

> there may be instances where * * * a brief period without reinstatement of a program is too short a time to conclude that a government is not likely to reinstate the program. This is particularly true with respect to orders issued after the January 1, 1995, effective date of the URAA which instituted the sunset review process. In those cases, a government may rescind a program in a period preceding the initiation of the sunset review of an order, with the intent of reinstating the program should the order be revoked. In the case of both the IPRS and the CCS programs, the Indian Ministry of Commerce terminated the programs prior to the URAA effective date and several years before the November 1998 initiation of the sunset review of the CVD order on iron-metal castings. Consequently, in this case, we find it reasonable to conclude that a sufficient period of

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[4] *Id.* at 10.

[5] It should also be noted that the ITA's policy bulletin provides that

> where a company has a long track record of not using a program, including during the investigation, the Department normally will determine that the mere availability of the program does not, by itself, indicate likelihood of continuation or recurrence of a countervailable subsidy.

Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin, 63 Fed.Reg. 18,871, 18,874 (April 16, 1998).

time has lapsed to indicate that the Indian Ministry of Commerce is not likely to reinstate the IPRS program.

Final Results, p. 8. This court concurs.

II

In the light of the foregoing, the court cannot and therefore does not conclude that defendant's *Final Results of Re-determination Pursuant to Court Remand* (May 25, 2001) are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Hence, they should be affirmed. Judgment will enter accordingly.

(Slip Op. 01–76)

NTN BEARING CORP. OF AMERICA, NTN KUGELLAGERFABRIK (DEUTSCHLAND) GMBH, SKF USA INC., SKF GMBH, FAG KUGELFISCHER GEORG SCHAFER AG, AND FAG BEARINGS CORP., PLAINTIFFS AND DEFENDANT-INTERVENORS, AND INA WALZLAGER SCHAEFFLER OHG AND INA BEARING CO., INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO., DEFENDANT-INTERVENOR AND PLAINTIFF

Consolidated Court No. 97–10–01800

Plaintiffs and defendant-intervenors NTN Bearing Corporation of America, NTN Kugellagerfabrik (Deutschland) GmbH (collectively "NTN"), SKF USA Inc., SKF GmbH (collectively "SKF"), FAG Kugelfischer Georg Schafer AG, FAG Bearings Corporation (collectively "FAG"), and plaintiffs INA Walzlager Schaeffler oHG and INA Bearing Company, Inc. (collectively "INA") move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging various aspects of the Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews ("Final Results")*, 62 Fed. Reg. 54,043 (Oct. 17, 1997), as amended, *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore[,] Sweden and the United Kingdom; Amended Final Results of Antidumping Duty Administrative Reviews*, 62 Fed. Reg. 61,963 (Nov. 20, 1997). Defendant-intervenor and plaintiff, The Torrington Company ("Torrington"), also moves pursuant to USCIT R. 56.2 for judgment upon the agency record challenging certain determinations of Commerce's *Final Results*.

Specifically, NTN contends that Commerce unlawfully: (1) denied a price-based level of trade ("LOT") adjustment to normal value ("NV") for its constructed export price ("CEP") sales; (2) refused to calculate CEP profit on an LOT-specific basis; (3) conducted a duty-absorption inquiry under 19 U.S.C. § 1675(a)(4) (1994) for the subject reviews of the applicable antidumping duty orders covering antifriction bearings ("AFBs") from Germany; (4) determined that it applied a reasonable duty-absorption methodology and that duty absorption had in fact occurred; and (5) denied a downward adjustment to NTN's reported United States indirect selling expenses for imputed interests incurred in financing cash deposits for antidumping duties.

SKF contends that Commerce unlawfully: (1) conducted a duty-absorption inquiry under 19 U.S.C. § 1675(a)(4) for the subject reviews of the applicable antidumping duty or-

ders covering AFBs from Germany; (2) determined that it applied a reasonable duty-absorption methodology and that duty-absorption had in fact occurred; and (3) calculated constructed value ("CV") profit.

FAG contends that Commerce unlawfully: (1) calculated CV profit; (2) failed to match United States sales to "similar" home-market sales prior to resorting to CV when all home-market sales of identical merchandise have been disregarded; (3) conducted a duty-absorption inquiry under 19 U.S.C. § 1675(a)(4) for the subject reviews of the applicable antidumping duty orders covering AFBs from Germany; (4) determined that it applied a reasonable duty-absorption methodology and that duty absorption had in fact occurred; and (5) treated certain direct selling expenses as indirect selling expenses.

INA contends that Commerce unlawfully: (1) refused to deduct downward billing adjustments on INA's home-market sales; (2) failed to match United States sales to "similar" home-market sales prior to resorting to CV when all home-market sales of identical merchandise have been disregarded; (3) calculated CV profit; (4) failed to exclude sales made out of the ordinary course of trade from the home-market database; (5) included its zero-priced United States transactions in the margin calculations; (6) excluded zero-priced home-market sample transactions but not home-market sample sales; (7) calculated a single weighted-average CEP profit rate for each class or kind of merchandise; (8) excluded amounts for imputed credit and inventory carrying expenses in its calculation of total expenses for the CEP profit ratio; and (9) conducted a duty-absorption inquiry under 19 U.S.C. § 1675(a)(4) for the subject reviews of the applicable antidumping duty orders covering AFBs from Germany.

Torrington contends that Commerce unlawfully: (1) accepted SKF's home-market support rebates; (2) accepted SKF's home-market billing adjustments; and (3) accepted FAG's home-market rebates.

Held: NTN's, SKF's, FAG's and INA's USCIT R. 56.2 motions are granted in part and denied in part. Torrington's USCIT R. 56.2 motion is denied. This case is remanded to Commerce to: (1) annul all findings and conclusions made pursuant to the duty-absorption inquiry conducted for the subject review in accordance with this opinion; (2) attempt to match United States sales to similar home-market sales before resorting to CV; (3) reconsider its determination to deny a downward billing adjustment to INA on its home-market sales; (4) clarify how it complied with the statutory framework of 19 U.S.C. §§ 1677e, 1677m (1994) for using facts available and applying an adverse inference and if it determines it did not adhere to all of the statutory prerequisite conditions, to give INA the opportunity to remedy or explain any deficiency regarding its alleged sample sales; and (5) include all expenses included in "total United States expenses" in the calculation of "total expenses" for INA.

[NTN's, SKF's, FAG's and INA's USCIT R. 56.2 motions are granted in part and denied in part. Torrington's USCIT R. 56.2 motion is denied. Case remanded.]

(Dated June 22, 2001)

Barnes, Richardson & Colburn (Donald J. Unger, Kazumune V. Kano and *Christine H.T. Yang)* for NTN.

Steptoe & Johnson LLP (Herbert C. Shelley and *Alice A. Kipel)* for SKF.

Grunfeld, Desiderio, Lebowitz & Silverman LLP (Max F. Schutzman, Andrew B. Schroth and *Mark E. Pardo)* for FAG.

Arent Fox Kintner Plotkin & Kahn, PLLC (Stephen L. Gibson) for INA.

Stuart E. Schiffer, Acting Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Velta A. Melnbrencis,* Assistant Director); of counsel: *Mark A. Barnett, Patrick V. Gallagher, Rina Goldenberg* and *David R. Mason,* Office of the Chief Counsel for Import Administration, United States Department of Commerce, for defendant.

Stewart and Stewart (Terence P. Stewart, Wesley K. Caine, Geert De Prest and *Lane S. Hurewitz)* for Torrington.

OPINION

TSOUCALAS, *Senior Judge:* Plaintiffs and defendant-intervenors NTN Bearing Corporation of America, NTN Kugellagerfabrik (Deutschland)

GmbH (collectively "NTN"), SKF USA Inc., SKF GmbH (collectively "SKF"), FAG Kugelfischer Georg Schafer AG, FAG Bearings Corporation (collectively "FAG"), and plaintiffs INA Walzlager Schaeffler oHG and INA Bearing Company, Inc. (collectively "INA") move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging various aspects of the Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews ("Final Results")*, 62 Fed. Reg. 54,043 (Oct. 17, 1997), as amended, *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore[,] Sweden and the United Kingdom; Amended Final Results of Antidumping Duty Administrative Reviews*, 62 Fed. Reg. 61,963 (Nov. 20, 1997). Defendant-intervenor and plaintiff, The Torrington Company ("Torrington"), also moves pursuant to USCIT R. 56.2 for judgment upon the agency record challenging certain determinations of Commerce's *Final Results*.

Specifically, NTN contends that Commerce unlawfully: (1) denied a price-based level of trade ("LOT") adjustment to normal value ("NV") for its constructed export price ("CEP") sales; (2) refused to calculate CEP profit on an LOT-specific basis; (3) conducted a duty-absorption inquiry under 19 U.S.C. § 1675(a)(4) (1994) for the subject reviews of the applicable antidumping duty orders covering antifriction bearings ("AFBs") from Germany; (4) determined that it applied a reasonable duty-absorption methodology and that duty absorption had in fact occurred; and (5) denied a downward adjustment to NTN's reported United States indirect selling expenses for imputed interests incurred in financing cash deposits for antidumping duties.

SKF contends that Commerce unlawfully: (1) conducted a duty-absorption inquiry under 19 U.S.C. § 1675(a)(4) for the subject reviews of the applicable antidumping duty orders covering AFBs from Germany; (2) determined that it applied a reasonable duty-absorption methodology and that duty absorption had in fact occurred; and (3) calculated constructed value ("CV") profit.

FAG contends that Commerce unlawfully: (1) calculated CV profit; (2) failed to match United States sales to "similar" home-market sales prior to resorting to CV when all home-market sales of identical merchandise have been disregarded; (3) conducted a duty-absorption inquiry under 19 U.S.C. § 1675(a)(4) for the subject reviews of the applicable antidumping duty orders covering AFBs from Germany; (4) determined that it applied a reasonable duty-absorption methodology and that duty absorption had in fact occurred; and (5) treated certain direct selling expenses as indirect selling expenses.

INA contends that Commerce unlawfully: (1) refused to deduct downward billing adjustments on INA's home-market sales; (2) failed to

match United States sales to "similar" home-market sales prior to resorting to CV when all home-market sales of identical merchandise have been disregarded; (3) calculated CV profit; (4) failed to exclude sales made out of the ordinary course of trade from the home-market database; (5) included its zero-priced United States transactions in the margin calculations; (6) excluded zero-priced home-market sample transactions but not home-market sample sales; (7) calculated a single weighted-average CEP profit rate for each class or kind of merchandise; (8) excluded amounts for imputed credit and inventory carrying expenses in its calculation of total expenses for the CEP profit ratio; and (9) conducted a duty-absorption inquiry under 19 U.S.C. § 1675(a)(4) for the subject reviews of the applicable antidumping duty orders covering AFBs from Germany.

Torrington contends that Commerce unlawfully: (1) accepted SKF's home-market support rebates; (2) accepted SKF's home-market billing adjustments; and (3) accepted FAG's home-market rebates.

BACKGROUND

This case concerns the seventh administrative review of the antidumping duty order on AFBs from Germany for the period of review ("POR") covering May 1, 1995 through April 30, 1996. On June 10, 1997, Commerce published the preliminary results of the seventh review. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden and the United Kingdom; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews ("Preliminary Results"),* 62 Fed. Reg. 31,566. Commerce published the *Final Results* on October 17, 1997, *see* 62 Fed. Reg. at 54,043, and the *Amended Final Results* on November 20, 1997, *see* 62 Fed. Reg. at 61,963.

Since the administrative review at issue was initiated after December 31, 1994, the applicable law is the antidumping statute as amended by the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103–465, 108 Stat. 4809 (1994) (effective January 1, 1995). *See Torrington Co. v. United States,* 68 F.3d 1347, 1352 (Fed. Cir. 1995) (citing URAA § 291(a)(2), (b) (noting effective date of URAA amendments)).

JURISDICTION

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a) (1994) and 28 U.S.C. § 1581(c) (1994).

STANDARD OF REVIEW

In reviewing a challenge to Commerce's final determination in an antidumping administrative review, the Court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994); *see NTN Bearing Corp. of Am. v. United States,* 24 CIT ____, ____, 104 F. Supp. 2d 110, 115–16 (2000) (detailing Court's standard of review for antidumping proceedings).

DISCUSSION

I. *Denial of a Price-based LOT Adjustment to NV (NTN)*

NTN contends that Commerce improperly denied a price-based LOT adjustment for CEP sales made in the United States market at an LOT different from the home-market sales.[1] *See* NTN's Mem. Supp. Mot. J. Agency R. ("NTN's Mem.") at 7. In particular, NTN argues, *inter alia,* that Commerce incorrectly determined NTN's CEP LOT because the agency failed to use the sale to the first unaffiliated purchaser in the United States to determine NTN's CEP LOT. *See id.* NTN requests that the Court remand the LOT issue to Commerce to grant NTN a price-based LOT adjustment for its CEP sales. *See id.* at 9.

Commerce, in turn, argues that it properly determined the LOT for NTN's CEP sales after deducting expenses and profit from the price to the first unaffiliated purchaser in the United States pursuant to § 1677a(d) because § 1677b(a)(7)(A), which provides for an LOT adjustment, requires Commerce to compare CEP, not the "unadjusted" starting price of CEP, with NV. *See* Def.'s Mem. in Partial Opp'n to Pls.' Mots. J. Agency R. ("Def.'s Mem.") at 92–93. Commerce notes CEP is defined in § 1677a(b) as the price at which the subject merchandise is first sold (or agreed to be sold) in the United States as "adjusted" under § 1677a(d). *See id.* at 93. According to Commerce, the adjusted CEP price is to be compared to prices in the home market based on the same LOT whenever it is practicable; when it is not practicable and the LOT difference affects price comparability, Commerce makes an LOT adjustment. *See id.* at 94. Commerce makes a CEP offset when Commerce is not able to quantify price differences between the CEP LOT and the LOT of the comparison sales, and if NV is established at a more advanced state of distribution than the CEP LOT. *See id.* If the CEP price is not adjusted before it is compared under the approach advocated by NTN, "there will *always* be substantial deductions from the resale prices in the United States (because they are mandatory)," but they "will be compared to resale prices in the home market from which virtually [there will] *never* be any equivalent deductions," thus creating a substantial imbalance and a skewed comparison between NV and CEP. *Id.* at 95 (emphasis in the original).

Commerce claims that it properly denied an LOT adjustment for NTN's CEP sales because NTN failed to establish its entitlement to an LOT adjustment. Commerce was unable to calculate an LOT adjustment because "NTN did not have a level of trade equivalent to the CEP level of trade in the home market," making it impossible to quantify the difference in price between the CEP LOT and the home-market LOT. *Id.* at 104–05. Commerce maintains that the Court should uphold its refusal to grant to NTN an LOT adjustment. *See id.* at 105.

Torrington generally agrees with Commerce's positions, emphasizing that: (1) Commerce correctly made § 1677a(d) adjustments to the start-

[1] For a complete discussion of background information and the statutory provisions at issue, the reader is referred to this Court's decision in *NTN Bearing Corp. of Am.*, 24 CIT at ___, 104 F. Supp. 2d at 125–128.

ing price of CEP prior to determining an LOT for NTN's CEP sales; and (2) properly denied an LOT adjustment for NTN's CEP sales. *See* Torrington's Resp. to Pls.' Mots. J. Agency R. ("Torrington's Resp.") at 32. Accordingly, Torrington contends that this Court should not disturb Commerce's reasonable interpretation of the statute as applied to the record evidence.

In *Micron Tech., Inc. v. United States*, 243 F.3d 1301 (Fed. Cir. 2001), the Court of Appeals for the Federal Circuit ("CAFC") held that the plain text of the antidumping statute and the Statement of Administrative Action ("SAA")[2] require Commerce to deduct the expenses enumerated under § 1677a(d) before making the LOT comparison.[3] The court examined §1677b(a)(1)(B)(i), which provides that Commerce must establish NV "to the extent practicable, at the same level of trade as the export price or [CEP]," and § 1677a(b), which defines CEP as "the price at which the subject merchandise is first sold (or agreed to be sold) in the United States * * * *as adjusted under subsections (c) and (d) of this section.*" (Emphasis supplied). The court concluded that "[r]ead together, these two provisions show that Commerce is required to deduct the subsection (d) expenses from the starting price in the United States before making the level of trade comparison." *Micron Tech., Inc.*, 243 F.3d at 1315. The court further stated that this conclusion is mandated by the SAA, which states that "'to the extent practicable, [Commerce should] establish [NV] based on home[–]market (or third[–]country) sales at the same level of trade as the constructed export price or the starting price for the export price.'" *Id.* (citing SAA at 829).

Thus, the Court finds that Commerce properly made § 1677a(d) adjustments to NTN's starting price in order to arrive at CEP and make its LOT determination. The Court also finds that Commerce's decision to deny NTN an LOT adjustment is supported by substantial evidence. Section 1677b(a)(7)(A) permits Commerce to make an LOT adjustment "if the difference in level of trade * * * involves the performance of different selling activities[] and * * * is demonstrated to affect price comparability, based on a pattern of consistent price differences between sales at different levels of trade in the country in which normal value is determined." With respect to CEP sales, Commerce found that the same LOT as that of the CEP for merchandise under review did not exist for any respondent in the home market; therefore, Commerce was unable to "determine whether there was a pattern of consistent price differ-

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[2] The Statement of Administrative Action ("SAA") represents "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements." H.R. Doc. 103–316, at 656 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040. "It is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement." *Id.*; *see also* 19 U.S.C. § 3512(d) (1994) ("The statement of administrative action approved by the Congress * * * shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.").

[3] The CAFC's decision effectively overturned the Court of International Trade's determination with respect to this issue in *Borden, Inc. v. United States*, 22 CIT 233, 4 F. Supp. 2d 1221 (1998), *rev'd* 2001 WL 312232 (Fed. Cir. Mar. 12, 2001), a case discussed by the parties in the instant matter.

ences between the [LOTs] based on respondent's [home-market] sales of merchandise under review." *See Final Results,* 62 Fed. Reg. at 54,056.

Commerce looked to alternative methods for calculating LOT adjustments in accordance with the SAA. *See id.* In particular, Commerce noted that the SAA states:

> "if information on the same product and company is not available, the [LOT] adjustment may also be based on sales of other products by the same company. In the absence of any sales, including those in recent time periods, to different levels of trade by the exporter or producer under investigation, Commerce may further consider the selling expenses of other producers in the foreign market for the same product or other products."

Id. (quoting SAA at 830). Commerce did not have the information that would have supported the use of these alternative methods. *See id.* Consequently, with respect to CEP sales which Commerce was unable to quantify an LOT adjustment, it granted a CEP offset to respondents, including NTN, where the home-market sales were at a more advanced LOT than the sales to the United States, in accordance with 19 U.S.C. § 1677b(a)(7)(B) (1994). *See id.* In sum, Commerce acted well within the directive of the statute in denying the LOT adjustment and granting a CEP offset instead. *See* 19 U.S.C. § 1677b(a)(7).

II. *Constructed Export Price Calculation Without Regard to LOT (NTN)*

NTN contends that Commerce erred by refusing to calculate CEP profit on LOT-specific basis.[4] *See* NTN's Mem. at 9. Highlighting the "narrowest category of merchandise" language of § 1677a(f)(2)(C)(ii) and (iii), NTN again argues that there is a clear statutory preference that profit be calculated on the narrowest possible basis. *See id.* at 10. Moreover, NTN claims that since CV profit is calculated by LOT and matching is by LOT, CEP profit should be calculated to account for differences in LOT. *See id.* NTN asserts that the mere fact that a calculation is difficult is not a valid reason to sacrifice accuracy. *See id.* at 11. NTN further asserts that Commerce's speculation that an adjustment is susceptible to manipulation provides no grounds for rejecting an adjustment. *See id.* at 12. NTN, therefore, requests that the Court remand the issue to Commerce to calculate CEP profit on an LOT-specific basis.

Commerce responds that it properly determined CEP profit without regard to LOT. *See* Def.'s Mem. at 105. Commerce notes, *inter alia,* that § 1677a(f) does not refer to LOT, that is, the statute does not require that CEP profit be calculated on an LOT-specific basis. *See id.* at 107. In addition, Commerce asserts that even assuming that a narrower basis for the CEP-profit calculation is warranted in some circumstances, NTN has not provided any factual support for such a deviation from Commerce's standard methodology for calculating CEP profit. *See id.* at 109. Torrington generally agrees with Commerce's CEP-profit calculation. *See* Torrington's Resp. at 32.

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[4] For a discussion of background and the relevant statutory provisions, the reader is referred to this Court's decision in *NTN Bearing Corp. of Am.*, 24 CIT at ___, 104 F. Supp. 2d at 133–34.

Section 1677a(f), as Commerce correctly notes, does not make any reference to LOT. Accordingly, the Court's duty under *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc. ("Chevron"),* 467 U.S. 837 (1984) is to review the reasonableness of Commerce's statutory interpretation. *See IPSCO, Inc. v. United States,* 965 F.2d 1056, 1061 (Fed. Cir. 1992) (quoting *Chevron,* 467 U.S. at 844).

This Court upheld Commerce's refusal to calculate CEP on an LOT-specific basis in *NTN Bearing Corp. of Am.,* 24 CIT at ____, 104 F. Supp. 2d at 133–35, finding it to be reasonable and in accordance with law. The Court examined the language of the statute and concluded that the statute clearly contemplates that, in general, the "narrowest category" will include the class or kind of merchandise that is within the scope of an investigation or review. The Court based its conclusion on its examination of subsections (ii) and (iii) of § 1677a(f)(C)'s "total expense" definition. Both subsections refer to "expenses incurred with respect to the narrowest category of merchandise * * * which includes the subject merchandise." The term "subject merchandise" is defined as "the class or kind of merchandise that is within the scope of an investigation, a review, a suspension agreement, an order under this subtitle or section 1303 of this title, or a finding under the Antidumping Act, 1921." 19 U.S.C. § 1677(25) (1994).

Accordingly, as in *NTN Bearing Corp. of Am.,* the Court finds that Commerce reasonably interpreted § 1677a(f) in refusing to apply a narrower subcategory of merchandise such as one based on LOT. The Court, moreover, agrees with Commerce's conclusion that a "subdivision of the CEP-profit calculation would be more susceptible to manipulation," a result that Congress specifically warned Commerce to prevent. *Final Results,* 62 Fed. Reg. at 54,072. Finally, even if the Court were to assume that a narrower basis for calculating CEP profit would be justified under some circumstances, the Court agrees with Commerce that NTN failed to provide adequate factual support of how the CEP-profit calculation was distorted by Commerce's standard methodology.

III. *Duty-absorption Inquiry (NTN, SKF, FAG, INA)*

A. *Background*

Title 19, United States Code, § 1675(a)(4) provides that during an administrative review initiated two or four years after the "publication" of an antidumping duty order, Commerce, if requested by a domestic interested party, "shall determine whether antidumping duties have been absorbed by a foreign producer or exporter subject to the order if the subject merchandise is sold in the United States through an importer who is affiliated with such foreign producer or exporter." Section 1675(a)(4) further provides that Commerce shall notify the International Trade Commission ("ITC") of its findings regarding such duty absorption for the ITC to consider in conducting a five-year ("sunset") review under 19 U.S.C. § 1675(c), and the ITC will take such findings into account in determining whether material injury is likely to contin-

ue or recur if an order were revoked under § 1675(c). *See* 19 U.S.C. § 1675a(a)(1)(D) (1994).

On May 31, 1996 and July 9, 1996, Torrington requested that Commerce conduct a duty-absorption inquiry pursuant to § 1675(a)(4) with respect to various respondents, including NTN, SKF, FAG and INA, to ascertain whether antidumping duties had been absorbed during the seventh POR. *See Final Results,* 62 Fed. Reg. at 54,075.

In the *Final Results,* Commerce found that duty absorption had occurred for the POR. *See id.* at 54,044. In asserting authority to conduct a duty-absorption inquiry under § 1675(a)(4), Commerce first explained that for "transition orders," as defined in 19 U.S.C. § 1675(c)(6)(C) (that is, antidumping duty orders, *inter alia,* deemed issued on January 1, 1995), regulation 19 C.F.R. § 351.213(j) provides that Commerce "will make a duty-absorption determination, if requested, for any administrative review initiated in 1996 or 1998." *Id.* at 54,074. Commerce concluded that: (1) because the antidumping duty order on the AFBs in this case has been in effect since 1989, the order is a transition order pursuant to § 1675(c)(6)(C); and (2) since this review was initiated in 1996 and a request was made, Commerce had the authority to make a duty-absorption inquiry for the seventh POR. *See id.* at 54,075.

B. *Contentions of the Parties*

NTN, SKF, FAG and INA contend that Commerce lacked authority under § 1675(a)(4) to conduct a duty-absorption inquiry for the seventh POR of the outstanding 1989 antidumping duty orders. *See* NTN's Mem. at 12; SKF's Br. Supp. Mot. J. Agency R. ("SKF's Br.") at 9; FAG's Br. Supp. Mot. J. Agency R. ("FAG's Br.") at 12; INA's Br. Supp. Mot. J. Agency R. ("INA's Br.") at 46. In the alternative, the parties assert that even if Commerce possessed the authority to conduct such an inquiry, Commerce's methodology for determining duty absorption was contrary to law and, accordingly, the case should be remanded to Commerce to reconsider its methodology. *See* NTN's Mem. at 17; SKF's Br. at 16; FAG's Br. at 15.

Commerce argues that it: (1) properly construed subsections (a)(4) and (c) of § 1675 as authorizing it to make a duty-absorption inquiry for antidumping duty orders that were issued and published prior to January 1, 1995; and (2) devised and applied a reasonable methodology for determining duty absorption. *See* Def.'s Mem. at 31–47. Torrington generally agrees with Commerce's contentions. *See* Torrington's Resp. at 8–14.

C. *Analysis*

In *SKF USA Inc. v. United States,* 24 CIT ____, 94 F. Supp. 2d 1351 (2000), this Court determined that Commerce lacked statutory authority under § 1675(a)(4) to conduct a duty-absorption inquiry for antidumping duty orders issued prior to the January 1, 1995 effective date of the URAA. *See id.* at ____, 94 F. Supp. 2d at 1357–59. The Court noted that Congress expressly prescribed in the URAA that § 1675(a)(4) "must be applied prospectively on or after January 1, 1995 for 19 U.S.C.

§ 1675 reviews." *Id.* at ____, 94 F. Supp. 2d at 1359 (citing § 291 of the URAA).

Because Commerce's duty-absorption inquiry, its methodology and the parties' arguments are practically identical to those presented in *SKF USA Inc.*, the Court adheres to its reasoning in *SKF USA Inc.* The statutory scheme clearly provides that the inquiry must occur in the second or fourth administrative review after the publication of the antidumping duty order, not in any other review, and upon the request of a domestic interested party. Accordingly, the Court finds that Commerce did not have statutory authority to undertake a duty-absorption investigation for the antidumping duty orders in dispute here. The Court remands this case to Commerce with instructions to annul all findings and conclusions made pursuant to the duty-absorption inquiry conducted for the subject review in accordance with this opinion.

IV. *Denial of an Adjustment to United States Indirect Selling Expenses for Interest Allegedly Incurred in Financing Cash Deposits for Antidumping Duties (NTN)*

A. *Background*

During the review, NTN claimed a downward adjustment to its reported United States indirect selling expenses for imputed interest expenses allegedly incurred in financing cash deposits for antidumping duties. *See Final Results,* 62 Fed. Reg. at 54,078. Commerce denied the adjustment and determined that such an interest offset to NTN's indirect selling expenses is inappropriate, whether based on actual interest expenses or an imputed amount allegedly associated with financing cash deposits. *See id.* at 54,079. Commerce thereby deducted the entire amount of NTN's reported indirect selling expenses, including all interest, from the CEP. *See id.*

Commerce noted that 19 U.S.C. § 1677a(d)(1), which provides for the deduction of certain selling expenses from CEP that were "incurred by or for the account of the producer or exporter, or the affiliated seller in the United States, in selling the subject merchandise," does not precisely define what constitutes a selling expense; instead, Congress has given Commerce discretionary authority to determine what such an expense encompasses. Commerce acknowledged that in past reviews of the applicable antidumping duty orders, it determined that interest expenses incurred in financing antidumping duty cash deposits were not considered selling expenses and thereby allowed an offsetting, financing-cost adjustment to United States indirect selling expenses, "mainly to account for the opportunity cost associated with making a deposit *(i.e.,* the cost of having money unavailable for a period of time)." *Preliminary Results,* 62 Fed. Reg. at 31,569; *see Final Results,* 62 Fed. Reg. at 54,079. For this review, however, Commerce reconsidered its position and concluded that this offsetting financing-cost adjustment is inappropriate. *See Final Results,* 62 Fed. Reg. at 54,079.

Commerce found that while under the statute it may allow a limited exemption from deductions from United States price for antidumping

duty cash deposits and legal fees associated with participation in an antidumping case, it found no basis for extending this exemption to interest expenses allegedly incurred in financing the cash deposits. *See id.* The agency reasoned that there is a distinction "between business expenses that arise from economic activities in the United States and business expenses that are direct, inevitable consequences of the dumping order." *Id.* Commerce determined that while cash deposits and legal fees are incurred solely as a result of the existence of an antidumping order, "[f]inancial expenses allegedly associated with cash deposits are not a direct, inevitable consequence of an antidumping order." *Id.* In particular, Commerce explained that although it may be true that some importers sometimes incur a cost if they borrow money in order to pay for cash deposits of antidumping duties, it is a fundamental principle that:

> 'money is fungible. If an importer acquires a loan to cover one operating cost, that may simply mean that it will not be necessary to borrow money to cover a different operating cost.' Companies may choose to meet obligations for cash deposits in a variety of ways that rely on existing capital resources or that require raising new resources through debt or equity. For example, companies may choose to pay deposits by using cash on hand, obtaining loans, increasing sales revenues, or raising capital through the sale of equity shares. In fact, companies face these choices every day regarding all their expenses and financial obligations. There is nothing inevitable about a company having to finance cash deposits and there is no way for [Commerce] to trace the motivation or use of such funds even if it were.

Id. (quoting *Preliminary Results,* 62 Fed. Reg. at 31,569). Commerce also noted that "the calculation of the dumping margins should not vary depending on whether a party has funds available to pay cash deposits or requires additional funds in the form of loans." *Preliminary Results,* 62 Fed. Reg. at 31,569.

Moreover, Commerce determined that it should not impute an amount for any interest costs that would theoretically be associated with financing actual cash deposits of antidumping duties. *See Final Results,* 62 Fed. Reg. at 54,079. Commerce reasoned that "there is no real opportunity cost associated with paying cash deposits when the paying of such deposits is a precondition for doing business in the United States. * * * Companies cannot choose not to pay cash deposits if they want to import nor can they dictate the terms, conditions, or timing of such payments." *Id.*

B. *Contentions of the Parties*

NTN claims that Commerce's rationale for denying NTN's adjustment for interest expenses is flawed because irrespective of how a company opts to finance the cash deposits for antidumping duties, the amount of cash deposited will have to be made up by financing something else, a result that is a direct inevitable consequence of the antidumping duty order. *See* NTN's Mem. at 22. NTN also asserts that if Commerce were to allow the interest expenses from cash deposits from

prior reviews to affect the dumping margin calculations of present reviews, a never-ending cycle would follow that would prevent Commerce from ever revoking the antidumping duty order. *See id.* at 23.

NTN also asserts that *Federal-Mogul Corp. v. United States,* 20 CIT 1438, 1440–41, 950 F. Supp. 1179, 1182–83 (1996), clearly refutes Commerce's decision to deny NTN's interest-expense adjustment. *See id.* at 24. In particular, NTN notes the court in *Federal-Mogul* found that there was no support for a domestic party's "'assertion that any expense related to antidumping proceedings is automatically a selling expense related to the sale of the subject merchandise.'" *Id.* (quoting *Federal-Mogul Corp.,* 20 CIT at 1440–41, 950 F. Supp. at 1183).

Commerce argues that its decision to deny the offset was within its discretion. *See* Def.'s Mem. at 112. Commerce also argues that it may change its methodology if it presents a reasonable basis for departing from its previous practice. *See id.* Further, Commerce contends that the interest expenses allegedly incurred with financing antidumping duty cash deposits are ordinary interest expenses and, therefore, not deductible from United States indirect selling expenses. *See id.* at 113–14.

Torrington asserts that Commerce reasonably denied the offset, because allowing United States selling expenses to be reduced in the manner claimed by NTN encourages dumping. *See* Torrington's Resp. at 19. Specifically, Torrington argues that the more a company dumps its merchandise in the United States, the alleged interest expenses on antidumping duty cash deposits will become greater. *See id.* at 19. Torrington contends that as the interest expense becomes greater, so does the offset to its reported United States indirect selling expenses and, indeed, if the offset becomes sufficiently large, dumping margins could disappear over time. *See id.* Torrington also argues that there is no evidence that NTN actually obtained loans for the purpose of posting cash deposits and, therefore, there is no factual basis for the adjustment. *See id.*

C. *Analysis*

Although NTN correctly points out that interest expenses incurred on financing antidumping cash deposits are not "selling expenses," *see Federal-Mogul Corp.,* 20 CIT at 1140–41, 950 F. Supp. at 1183, the Court disagrees that Commerce is prohibited from altering its methodology of making adjustments to United States indirect selling expenses. This Court has noted that "Commerce may, in certain circumstances, reasonably change its methodology from review to review." *Timken Co. v. United States,* 21 CIT 1313, 1332, 989 F. Supp. 234, 250 (1997), *vacated in part on other grounds,* 1 F. Supp. 2d 1390, 1393 (1998) (allowing Commerce to alter its methodology with respect to interest expenses incurred for financing cash deposits).

Consequently, since 19 U.S.C. § 1677a(d) does not provide clear guidance with respect to the adjustment, the issue for the Court is whether Commerce's interpretation of the statute was reasonable. The Court finds that Commerce reasonably interpreted the statute by concluding

that financing expenses incurred on antidumping duty cash deposits are not an inevitable consequence of the antidumping duty order and that, with respect to imputed interest costs, there is no real opportunity cost associated with cash deposits when the paying of such deposits is a precondition for doing business in the United States. Further, the Court finds that NTN failed to provide any evidence on record that supported its claim that it actually or approximately incurred the alleged interest expenses on antidumping duty cash deposits. Commerce acted rationally in denying NTN's claimed interest-expense adjustment and, therefore, Commerce's determination is sustained.

V. *Profit Calculation for CV (SKF, FAG, INA)*

Commerce applied the "preferred" method for calculating CV cost pursuant to 19 U.S.C. § 1677b(e)(2)(A), calculating an actual profit ratio for FAG, SKF and INA. *See* Def.'s Mem. at 17 (citing *Final Results*, 62 Fed. Reg. at 54,063. First, Commerce subtracted costs and expenses from the home-market price in order to calculate the profit for each sale of the foreign like product in the ordinary course of trade. Commerce then aggregated the profit for all sales at the same LOT and divided this profit by the exporter's or producer's aggregate cost totals for the same sales. *See* Def.'s Mem. at 17–18 (citing *Preliminary Results*, 62 Fed. Reg. at 31,571).

A. *Contentions of the Parties*

FAG contends that Commerce acted contrary to the plain meaning of 19 U.S.C. § 1677b(e)(2)(A) in calculating CV profit on an aggregated "class or kind" basis while disregarding sales outside the ordinary course of trade. *See* FAG's Br. at 5–10. FAG maintains that the statute permits Commerce to use an aggregated CV-profit calculation only if no below-cost sales are disregarded in the calculation. *See id.* at 10–11. SKF and INA make similar arguments. *See* SKF's Br. at 38–57; INA's Br. at 15–28.

Commerce maintains that it applied a reasonable interpretation of § 1677b(e)(2)(A) and properly based CV profit on aggregate profit data of all foreign like products under consideration for NV while disregarding below-cost sales. *See* Def.'s Mem. at 12–29. Torrington generally agrees with Commerce. *See* Torrington's Resp. at 23–25.

B. *Analysis*

In *RHP Bearings Ltd. v. United States*, 23 CIT ____, 83 F. Supp. 2d 1322 (1999), this Court held, *inter alia*, that Commerce's CV-profit methodology, which consists of using the aggregate data of all foreign like products under consideration for NV, is consistent with the antidumping statute. Since FAG's, SKF's and INA's arguments and the methodology at issue in this case are practically identical to those presented in *RHP Bearings*, the Court adheres to its reasoning in *RHP Bearings* and, therefore, finds Commerce's CV-profit methodology to be in accordance with law. Furthermore, since the methodology in § 1677b(e)(2)(A) explicitly requires that only sales "in the ordinary

course of trade" be included in the calculation, and below-cost sales that were disregarded in determining NV are not part of the "ordinary course of trade," the exclusion of below-cost sales was appropriate. *See* 19 U.S.C. §§ 1677(15), 1677b(b)(1).

VI. *Matching United States Sales to "Similar" Home-Market Sales Prior to Resorting to CV (FAG, INA)*

FAG and INA maintain that Commerce erred in resorting to CV without first attempting to match United States sales—export price ("EP") or CEP sales—to "similar" home-market sales in instances where all home-market sales of identical merchandise have been disregarded because they were out of the ordinary course of trade. *See* FAG's Br. at 12; INA's Br. at 13–15. FAG and INA maintain that a remand is necessary to bring Commerce's practice in line with the CAFC's decision in *Cemex, S.A. v. United States*, 133 F.3d 897, 904 (Fed. Cir. 1998). Commerce agrees with FAG and INA. *See* Def.'s Mem. at 30.

The Court agrees with the parties. In *Cemex, S.A.*, the CAFC reversed Commerce's practice of matching a United States sale to CV when the identical or most similar home-market model failed the cost test. *See* 133 F.3d at 904. The CAFC stated that "[t]he plain language of the statute requires Commerce to base foreign market value [(now NV)] on non-identical but similar merchandise [(foreign like product under post-URAA law)] * * * rather than [CV] when sales of identical merchandise have been found to be outside the ordinary course of trade." *Cemex, S.A.*, 133 F.3d at 904. In light of the CAFC's decision in *Cemex, S.A.*, this matter is remanded so that Commerce can first attempt to match United States sales to similar home-market sales before resorting to CV.

VII. *Treatment of Certain Selling Expenses as Indirect Selling Expenses (FAG)*

A. *Background*

FAG reported certain credits that it has issued to unrelated distributors as compensation for instances when FAG did not have the requested bearing in stock and was able to buy it from the distributor at a preferential price. *See* FAG's Br. at 19.

Commerce treated the credits as indirect selling expenses. Commerce explained that it treated them as indirect because "FAG did not demonstrate that there is a direct tie between its sales to the distributor and the distributor's sale that generates the payment." *Final Results*, 62 Fed. Reg. at 54,055.

B. *Contentions of the Parties*

FAG argues that the credit would not have been granted had FAG not requested the distributor make a transaction. *See* FAG's Br. at 19. FAG maintains that the link between the credit and the distributor's sale establishes the direct nature of the expense. *See id.* FAG claims that "the distributor would not have received the granted credit but for its original purchase of the bearing from FAG" and, therefore, the expenses can

be properly classified as direct and allocated on a customer-specific basis. *Id.* at 19–20 (citing SAA at 823–24).

Commerce replies that because the "expenses related to the sales of distributors to a third party" rather than "to FAG's direct sales to the distributors," Commerce classified them as indirect selling expenses. Def.'s Mem. at 49. Commerce argues that the credit expenses "are completely unrelated to FAG's sales to its distributor" and that "FAG is essentially rewarding its distributor for providing a service because the credits are issued only when FAG cannot meet a certain request." *Id.* at 50. Commerce maintains that because the credit bears no direct relationship to the sales under review, that is, to the sales by FAG to its distributors, the expense was properly treated as indirect. *See id.* Torrington supports Commerce's treatment of the expense. *See* Torrington's Resp. at 16–17.

C. *Analysis*

Commerce is required to grant an adjustment to NV for the differences in circumstances of sale ("COS"). *See* 19 U.S.C. § 1677b(a)(6)(C)(iii). The COS adjustment encompasses direct selling expenses, which are defined as expenses that "result from, and bear a direct relationship to, the particular sale in question." 19 C.F.R. § 351.410(b) and (c). FAG reported the credit expenses at issue as part of the COS adjustment.

Commerce issued a supplemental questionnaire to FAG, asking it to provide evidence of the direct relationship between the sales for which the expense occurred and the sales of the distributors to the distributors' customers. *See Final Results,* 62 Fed. Reg. at 54,054. FAG replied that "[t]here is no direct tie between FAG"s reported sales to the distributor and the sales of the distributor that generate the payment or credit." FAG KGS Supplemental Questionnaire Resp. for 1995–96 Admin. Review Secs. A-D (12/10/96) (Case No. A–428–801) at 30. Additionally, in its case brief, FAG confirmed that the claimed expense was produced by the distributor's sales to the unrelated party and not by FAG's sales. *See* FAG Case Brief for 1995–96 Admin. Review (7/1/97) (Case No. A–428–801) at 18–19.

As FAG plainly acknowledges, the credit expense cannot properly be classified as direct because it does not bear a direct relationship to the sales under review, that is, to the sales made by FAG to the distributor. Because Commerce properly refused to treat the credit expenses at issue as direct, Commerce's determination is sustained.

VIII. *Deduction of Downward Billing Adjustments on Home-Market Sales (INA)*

INA argues that Commerce erred in not allowing downward billing adjustments on home-market sales. *See* INA's Br. at 9. INA maintains that Commerce's rejection of its adjustments "is based on an erroneous and unwarranted assumption that INA determined such adjustments by allocation" when, in fact, "INA determined billing adjustments on an invoice and product specific basis, not by allocation." *Id.* at 12.

In the *Final Results,* Commerce stated that it did not view the omission of downward home-market billing adjustments as a clerical error and refused to allow the adjustment. *See Final Results,* 62 Fed. Reg. at 54,042. In preparing its arguments to this Court, however, Commerce reviewed the record and concluded "that it erred in denying INA's downward billing adjustments." Def.'s Mem. at 51. Commerce agrees that the case should be remanded so that it can grant a downward billing adjustment to INA on its home-market sales. *See id.* In light of the foregoing, this case is remanded to Commerce to reconsider its determination to deny a downward billing adjustment to INA on its home-market sales.

IX. *Exclusion of Sales Made Out of the Ordinary Course of Trade from the Home-Market Database (INA)*

A. *Background*

Commerce is required to base its NV calculation upon "the price at which the foreign like product is first sold * * * in the ordinary course of trade." 19 U.S.C. § 1677b(a)(1)(B)(i). Analogously, CV must be calculated using "amounts incurred * * * for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country * * *." 19 U.S.C. § 1677b(e)(2)(A). INA contended during the review that Commerce should have excluded one specific sale "that by any measure was made at an aberrational price with an abnormally high profit" as being outside of the ordinary course of trade. *Final Results,* 62 Fed. Reg. at 54,066. Commerce rejected INA's contention, explaining as follows:

> The presence of profits higher than those of numerous other sales does not necessarily place the sale outside the ordinary course of trade for purposes of computing CV profit. In order to determine that a sale is outside the ordinary course of trade due to abnormally high profits, there must be certain unique and unusual characteristics related to the sale in question. However, the respondents have provided no information other than the numerical profit amounts to support their contention that certain HM sales had abnormally high profits. Accordingly, we have not excluded INA's specific sale from the CV-profit calculation.

Id.

B. *Contentions of the Parties*

INA argues that Commerce's failure to exclude one of its sales with an unusually high price and profit level from the final results calculation was inconsistent with 19 U.S.C. § 1677b(a)(1)(B) and the SAA, both of which clearly instruct Commerce to make such an exclusion. *See* INA's Br. at 29. INA argues that "the SAA makes clear that aberrational price and abnormally high profits are *per se* characteristics of sales outside the ordinary course of trade and, accordingly, that no other 'unique and unusual characteristics' need be shown." *Id.* at 30. INA also contends that Commerce's position is contrary to 19 C.F.R. § 351.102(d). *See id.* at 30–31.

Commerce alleges that it properly exercised its discretion in rejecting INA's argument that Commerce must disregard sales with high profit levels as sales not in the ordinary course of trade because "INA failed to provide the necessary additional evidence to support its claim" and, therefore, Commerce's decision to treat the sale as within the ordinary course of trade was proper. Def.'s Mem. at 57. Commerce contends that INA's refusal to provide requested information prevented Commerce from evaluating all of the relevant circumstances particular to the sales in question. *See id.* at 58.

Torrington claims that Commerce properly rejected INA's request to exclude high-price and high-profit sales from the NV and CV calculation because: (1) a higher price or profit on a particular sale does not establish that a sale is outside the ordinary course of trade; and (2) INA failed to show that the contested sales were not in the ordinary course of trade. *See* Torrington's Resp. at 21–22.

C. *Analysis*

The term "ordinary course of trade" is defined as:

> the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind. [Commerce] shall consider the following sales and transactions, *among others*, to be outside the ordinary course of trade:
>
> (A) Sales disregarded under section 1677b(b)(1) of this title.
> (B) Transactions disregarded under section 1677b(f)(2) of this title.

19 U.S.C. § 1677(15) (emphasis supplied). Section 1677b(b)(1) deals with below-cost sales. Section 1677b(f)(2) deals with sales to affiliated persons. Therefore, Commerce must consider below-cost sales and sales between related parties as sales outside the ordinary course of trade. Although § 1677b(b)(1)'s below-cost sales and § 1677b(f)(2)'s affiliated-party transactions are specifically designated as outside the ordinary course of trade, the "among others" language of § 1677(15) clearly indicates that other types of sales could be excluded as being outside the ordinary course of trade.[5]

Determining whether a sale or transaction is outside the ordinary course of trade is a question of fact. In making this determination, Commerce considers not just "one factor taken in isolation but rather * * * all the circumstances particular to the sales in question." *Murata Mfg.*

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[5] The SAA accompanying the URAA provides that aside from §§ 1677b(b)(1), (f)(2) transactions:

> Commerce *may* consider other types of sales or transactions to be outside the ordinary course of trade *when such sales or transactions have characteristics that are not ordinary* as compared to sales or transactions generally made in the same market. Examples of such sales or transactions include *merchandise produced according to unusual product specifications, merchandise sold at aberrational prices, or merchandise sold pursuant to unusual terms of sale.* As under existing law, amended section 771(15) does not establish an exhaustive list, but the Administration intends that Commerce will interpret section 771(15) in a manner which will avoid basing normal value on sales which are extraordinary for the market in question, particularly when the use of such sales would lead to irrational or unrepresentative results.

H.R. DOC. No. 103-316, vol. 1, at 834 (emphasis supplied). The SAA also provides that "[o]ther examples of sales that Commerce could consider to be outside the ordinary course of trade include sales of off-quality merchandise, sales to related parties at non-arm's-length prices, and sales with abnormally high profits." *Id.* at 839–40.

Co. v. United States, 17 CIT 259, 264, 820 F. Supp. 603, 607 (1993) (citation omitted). Thus, Commerce has the discretion to interpret § 1677(15) to determine which sales are outside the ordinary course of trade, such as sales involving aberrational prices and abnormally high profit levels.

In resolving questions of statutory interpretation, the *Chevron* test requires this Court first to determine whether the statute is clear on its face. If the language of the statute is clear, then this Court must defer to Congressional intent. *See Chevron,* 467 U.S. at 842–43. If the statute is unclear, however, then the question for the Court is whether the agency's answer is based on a permissible construction of the statute. *See id.* at 843; *see also Corning Glass Works v. United States Int'l Trade Comm'n,* 799 F.2d 1559, 1565 (Fed. Cir. 1986) (finding the agency's definitions must be "reasonable in light of the language, policies and legislative history of the statute").

Here, the statutory provision defining what is considered outside the ordinary course of trade is unclear. While the statute specifically defines "ordinary course of trade," it provides little assistance in determining what is outside the scope of that definition. The statute merely identifies a non-exhaustive list of situations in which sales or transactions are to be considered outside the "ordinary course of trade." This Court finds the statute is ambiguous as to what constitutes a sale outside the ordinary course of trade. What Congress intended to exclude from the "ordinary course of trade" is also not immediately clear from the statute's legislative history. In the SAA, Congress stated that in addition to the specific types of transactions to be considered outside the ordinary course of trade, "Commerce may consider other types of sales or transactions to be outside the ordinary course of trade when such sales or transactions have characteristics that are not ordinary as compared to sales or transactions generally made in the same market." SAA at 834. Congress also stated that as the statute does not provide an exhaustive list of situations which qualify as being outside the ordinary course of trade, "the Administration intends that Commerce will interpret section 771(15) [19 U.S.C. § 1677(15)] in a manner which will avoid basing normal value on sales which are extraordinary for the market in question." *Id.* This Court finds the legislative history is also ambiguous as to what constitutes a sale outside the ordinary course of trade.

Because neither the statutory language nor the legislative history explicitly establishes what is considered to be outside the "ordinary course of trade," the Court assesses the agency's interpretation of the provision to determine whether the agency's interpretation is reasonable and in accordance with the legislative purpose. *See Chevron,* 467 U.S. at 843. In determining whether Commerce's interpretation is reasonable, the Court considers, among other factors, the express terms of the provisions at issue, the objectives of those provisions, and the objective of the antidumping scheme as a whole. The purpose of the ordinary course of trade provision is "to prevent dumping margins from being based on

sales which are not representative" of the home market. *See Monsanto Co. v. United States,* 12 CIT 937, 940, 698 F. Supp. 275, 278 (1988). Commerce's methodology for deciding when sales are outside the "ordinary course of trade" has been to examine the totality of the circumstances surrounding the sale or transaction in question to determine whether the sale or transaction is extraordinary. Commerce's methodology allows it, on a case-by-case basis, to examine all conditions and practices which may be considered ordinary in the trade under consideration and to determine which sales or transactions are, therefore, outside the ordinary course of trade. Because such a methodology gives Commerce wide discretion in deciding under what circumstances sales or transactions are outside the ordinary course of trade and circumstances differ in each case, this Court finds that, in light of the statute's legislative purpose, Commerce's interpretation of the statute and exercise of its discretion by requiring additional evidence demonstrating that sales with high profit levels were outside of the ordinary course of trade before excluding such sales from the NV and CV calculations was reasonable.

INA provided Commerce with insufficient evidence to show that Commerce should have excluded sales with abnormally high prices or profits. The mere fact of abnormally high prices or profits is not enough to put these sales outside of the ordinary course of trade. The presence of prices or profits higher than those of other sales is merely an element for Commerce to take into consideration and does not necessarily place the sales outside of the ordinary course of trade; nor does it strip Commerce of the right to exercise its discretion and conclude that sales with abnormally high prices or profits lack the characteristics necessary to place them outside the ordinary course of trade.

Thus, because Commerce's interpretation and application of the statute was reasonable and the record reflects that INA did not provide sufficient additional evidence that supports its claim that the disputed sales were extraordinary for the market in question, Commerce was justified in its decision to include INA's sales in the NV and CV calculations.

X. *Inclusion of Zero-Priced United States Transactions in the Margin Calculations (INA)*

A. *Background*

Commerce had requested certain information in its questionnaire to INA regarding transactions that INA claimed to involve sample or prototype sales. Commerce required respondents to identify such transactions, and also requested the following information:

> 1) Describe how the orders for these sales were communicated.
> 2) What documents are available to demonstrate that these sales are samples or prototypes?
> 3) Did the customer in question purchase these particular items before the date of the claimed sample sale? If so, how many were purchased?

> 4) Contrast the prices and quantities involved in these purchases with normal sales of these items, if any, to other customers and subsequent sales to the same customer.
>
> 5) What was the ultimate disposition of these bearings? Did title pass to the recipient of the merchandise? Were the bearings tested and destroyed during trial application?

INA Questionnaire Resp. for 1995–96 Admin. Review Sec. B (9/10/96) (Case No. A–428–801) at C–53. INA deemed the information irrelevant and did not provide it, stating the following:

> Since INA-USA cannot systematically identify all transactions that might be considered to involve samples, it has omitted this field. It is the understanding of INA-USA that the Department does not distinguish between sample transactions and other transactions in analyzing U.S. sales, in any event. Transactions involving bearings that were provided to the customer at no charge can be identified in the U.S. sales files by gross unit price of zero in field 16.0.

Id. at C–54.

Subsequently, the CAFC promulgated its decision in *NSK Ltd. v. United States ("NSK")*, 115 F.3d 965, 975 (Fed. Cir. 1997). In *NSK*, the CAFC held "that the term 'sold' * * * requires both a transfer of ownership to an unrelated party and consideration." 115 F.3d at 975. Thus, a zero-priced transaction does not qualify as a "sale" and, therefore, by definition cannot be included in Commerce's NV calculation. The distribution of AFBs for no consideration falls outside the purview of 19 U.S.C. § 1673 (1994).

In the final results, Commerce reviewed the record information for each respondent who reported zero-priced samples to ascertain whether each respondent appeared to have received consideration for the samples. *See* Def.'s Mem. at 60. Commerce reviewed the questionnaire responses and "when the respondent had responded fully and the response provided no indication that the respondent had received consideration for the sample," Commerce excluded the transaction from the margin calculation. *Id.* With respect to INA, Commerce found, as facts available, that INA received consideration for the sample. *See id.* In the *Final Results*, Commerce stated the following:

> [T]he party in possession of the information has the burden of producing that information, particularly when seeking a favorable adjustment or exclusion. INA did not answer our questions regarding the purchase history of parties receiving samples. INA also did not answer our questions regarding the prices and quantities involved in sample transactions. The answers to these questions would have aided us in determining whether INA received a bargained-for exchange from its U.S. customers. Lacking knowledge of the details of these transactions, we cannot conclude that INA received no consideration for these alleged samples. In other words, because INA impeded our investigation of these transactions, we determined that an adverse inference is appropriate. Therefore, for these final

results, we have included INA's sample sales in its U.S. sales database.

62 Fed. Reg. at 54,071.

B. *Contentions of the Parties*

INA argues that in light of *NSK*, the Court should remand the matter to Commerce to exclude its zero-value transactions from the margin calculations. *See* INA's Br. at 32–37. INA points to its questionnaire response to show that bearings provided at no charge could be identified by their zero price in the sales listing. *See id.* at 35. INA argues that at the time it responded to Commerce's questionnaire, the issue of whether INA received consideration was irrelevant, since Commerce considered the transaction to be a covered sale irrespective of any consideration involved. *See id.* INA notes that in its questionnaire, Commerce never directly asked whether INA received consideration. *See id.* 35–36.

INA also argues that Commerce did not provide INA an opportunity to remedy any deficiencies of information regarding United States sample transactions prior to applying facts available, as mandated by 19 U.S.C. § 1677m(d). *See id.* at 36. INA argues "Commerce did not ask any question concerning whether or not INA received consideration for any reported transactions, Commerce did not notify INA of any deficiency in its response * * * and the issue of consideration did not become relevant until after the factual record in the review was closed" and, therefore, Commerce should not have resorted to adverse fact available. *Id.* INA also contends that there is no indication that INA received any consideration for the merchandise. *See id.*

Commerce does not dispute INA's reading of *NSK*, but maintains that INA's zero-priced United States sales were properly included in its dumping margin as facts available because INA refused to provide information that would have helped Commerce determine whether INA received consideration for the transactions. *See* Def.'s Mem. at 58. Commerce maintains that "[b]y declining to respond to the questions regarding U.S. samples, INA chose to take its chances as to whether such information would be relevant to Commerce's final results." *Id.* at 62. Commerce believes that its resort to adverse facts available was proper because the record was missing necessary information and INA failed to act to the best of its ability to provide the information. *See id.*

Torrington argues that money is not the only form of consideration cognizable under the antidumping law and, therefore, INA's declaration that the sales were at zero price does not mean they should automatically be excluded. *See* Torrington's Resp. at 27–28. Torrington points out that other forms of consideration could be exchanged, such as the situation where "a producer gives 'free' prototypes in the context of a broader understanding whereunder it develops and provides prototypes before supplying production quantities," or where a producer offers ten units plus a "sample" at a certain price and the price actually covers eleven units. *Id.* at 28. Torrington argues that the prototype

units or the sample in these situations could be considered to have been "sold" for purposes of *NSK*. *See id.* Thus, Torrington believes that Commerce was correct in rejecting INA's claim since Commerce did not have the information necessary to make its determination. *See id.* at 29.

C. *Analysis*

The antidumping statute mandates that Commerce use "facts otherwise available" (commonly referred to as "facts available") if "necessary information is not available on the record" of an antidumping proceeding. 19 U.S.C. § 1677e(a)(1). In addition, Commerce may use facts available where an interested party or any other person: (1) withholds information that has been requested by Commerce; (2) fails to provide the requested information by the requested date or in the form and manner requested, subject to 19 U.S.C. § 1677m(c)(1), (e); (3) significantly impedes an antidumping proceeding; and (4) provides information that cannot be verified as provided in section 19 U.S.C. § 1677m(i). *See id.* § 1677e(a)(2)(A)–(D). Section 1677e(a) provides, however, that the use of facts available shall be subject to the limitations set forth in 19 U.S.C. § 1677m(d).

Section 1677m(d), entitled "deficient submissions," provides that if Commerce determines that a response to a request for information does not comply with the request, the agency shall promptly inform the person submitting the response of the deficiency and permit that person an opportunity to remedy or explain the deficiency. If the remedial response or explanation provided by the party is found to be "not satisfactory" or untimely, Commerce may, subject to § 1677m(e), disregard "all or part of the original and subsequent responses" in favor of facts available. *Id.* § 1677m(d).

Once Commerce determines that use of facts available is warranted, § 1677e(b) permits Commerce to apply an "adverse inference" if it can find that "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information." Such an inference may permit Commerce to rely on information derived from the petition, the final determination, a previous review or any other information placed on the record. *See* 19 U.S.C. § 1677e(c) (1994). When Commerce relies on information other than "information obtained in the course of the investigation or review, [Commerce] shall, to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal." *Id.*

In order to find that a party "has failed to cooperate by not acting to the best of its ability," it is not sufficient for Commerce to merely assert this legal standard as its conclusion or repeat its finding concerning the need for facts available. *See Ferro Union, Inc. v. United States*, 23 CIT ____, ____, 44 F. Supp. 2d 1310, 1329 (1999) ("Once Commerce has determined under 19 U.S.C. § 1677e(a) that it may resort to facts available, it must make additional findings prior to applying 19 U.S.C. § 1677e(b) and drawing an adverse inference."). Rather, to be supported by substantial evidence, Commerce must clearly articulate: (1) "why it con-

cluded that a party failed to comply to the best of its ability prior to applying adverse facts," and (2) "why the absence of this information is of significance to the progress of [its] investigation." *Ferro Union, Inc.*, 23 CIT at ____, 44 F. Supp. 2d at 1331.

The *Final Results* do not clarify (1) whether INA was given prompt notice of the deficiency regarding the sample sales data and given the opportunity to remedy the deficiency, or (2) that even if INA provided a remedial response, whether Commerce determined that such a response was not satisfactory or untimely, as required by 19 U.S.C. § 1677m(d). Although Commerce asserted in its brief that INA met the requirements of 19 U.S.C. § 1677e(a), (b), *see* Def.'s Mem. at 62–63, the Court cannot defer to this *post hoc* rationalization as a basis to uphold Commerce's decision to use facts available because such a decision must be sustained, if at all, on the same basis as the reasoning articulated in the final determination itself, *see Hoogovens Staal BV v. United States*, 24 CIT ____, ____, 86 F. Supp. 2d 1317, 1331 (2000) (holding that "a reviewing court must evaluate the validity of an agency's decision on the basis of the reasoning presented in the decision itself. An agency determination 'cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order * * *.'") (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943)); *see also Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962) ("The courts may not accept * * * counsel's *post hoc* rationalizations for agency action; * * * an agency's discretionary order [must] be upheld, if at all, on the same basis articulated in the order by the agency itself.").[6] Further, even if the Court were to assume that Commerce met § 1677e(a)'s criteria for using facts available, the Court notes that Commerce did not articulate in the *Final Results* whether it made any "additional findings" that INA had failed to act to the best of its ability before applying an adverse inference under § 1677e(b).

The Court, however, agrees with Commerce's finding that it should not automatically exclude from its dumping margin analysis "any transaction to which a respondent applies the label 'sample.'" *Final Results*, 62 Fed. Reg. at 54,069. In determining whether to exclude samples from the sales database, as Commerce correctly noted, it must "examine the information on the record to determine whether the recipients of the samples have undertaken actual obligations to purchase AFBs from the provider of the free bearings or whether the recipients remained free to purchase bearings of their own accord." *Id.* This approach is clearly consistent with the CAFC's decision in *NSK*, where the appellate court determined that a foreign manufacturer's AFB "samples given to

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[6] Indeed, the Supreme Court has opined:

> If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive. In other words, 'We must know what a decision means before the duty becomes ours to say whether it is right or wrong.'

SEC v. Chenery Corp., 332 U.S. 194, 196–97 (1947) (quoting *United States v. Chicago, M., St. P. & P.R. Co.*, 294 U.S. 499, 511 (1935)).

potential customers at no charge lacked consideration [because] * * * there is no evidence that potential customers had any obligation regarding samples received from [the manufacturer]. These potential customers were free to transact with [the manufacturer] based solely on their whim." 115 F.3d at 975 (noting that "[w]hen the promisor may choose to perform based solely on whim, then the promise will not serve as consideration") (citing 3 Williston on Contracts, § 7:7 at 89 (4th ed. 1992))). The CAFC explained that "[c]onsideration generally requires a bargain-for exchange," *id.* (citing 3 Williston on Contracts, § 7:2 at 18–19), and also noted that a "sale" is defined as "'the act of selling: a contract transferring the absolute or general ownership of property from one person * * * to another for a price (as a sum of money or any other consideration).'" *Id.* at 974 (quoting *Webster's Third New International Dictionary* 2003 (1986)). In others words, as Commerce accurately noted in the *Final Results,* consideration, or "price," is not necessarily limited to a "sum of money." *See* 62 Fed. Reg. at 54,069 (stating that Commerce would not limit its "review of consideration to the payment of a monetary price for the sample products").

The Court also notes that a respondent still maintains the burden of showing that there is either no consideration or no transfer of ownership to an unrelated party in order to exclude the sample sales from the dumping margin analysis. *See generally Timken Co. v. United States,* 11 CIT 786, 804, 673 F. Supp. 495, 513 (1987) (stating that Commerce "acts reasonably in placing the burden of establishing adjustments on a respondent that seeks the adjustments and that has access to the necessary information").

In light of the considerable uncertainty left by the *Final Results,* the Court cannot conclude that Commerce's use of adverse facts available was warranted under 19 U.S.C. § 1677e(a). The Court, therefore, remands the issue to Commerce to clarify how it complied with the statutory framework of 19 U.S.C. §§ 1677e, 1677m for using facts available and applying an adverse inference. If in the remand results Commerce determines it did not adhere to all of the statutory prerequisite conditions, Commerce must give INA the opportunity to remedy or explain any deficiency regarding its alleged sample sales.

XI. *Commerce's Refusal to Exclude Home-Market Sample Sales-Exhaustion of Administrative Remedies (INA)*

INA argues that Commerce erred in refusing to exclude home-market sales that INA alleges are outside the ordinary course of trade. *See* INA's Br. at 37. INA alleges that Commerce properly excluded zero-priced transactions, but erroneously refused to find that "other sample transactions" were outside the ordinary course of trade. *See id.* at 38. INA believes that Commerce requested information on sample sales for the sole purpose of determining whether they were made in the ordinary course of trade and, therefore, Commerce was compelled to determine whether such sales were made in the ordinary course of trade regardless of whether INA raised the issue. *See id.*

Commerce contends that the Court should not consider the issue because INA failed to exhaust its administrative remedies. *See* Def.'s Mem. at 63. In the alternative, Commerce argues that should the Court find that INA was not obligated to exhaust its administrative remedies, then the Court should sustain Commerce's determination because INA failed to show that its home-market sample sales were not in the ordinary course of trade. *See id.* Torrington generally supports Commerce's position. *See* Torrington's Resp. at 30.

INA flatly concedes that it "did not raise any issue with respect to home market sample sales in its case brief." INA's Br. at 37. INA appears to be arguing that this Court should consider the issue despite INA's failure to raise it at the administrative level because "Commerce determined in its final results notice to exclude INA's zero-priced home market sample transactions but at the same time failed," on its own initiative, "to consider whether INA's other home market sample transactions should be excluded." *Id.*

The exhaustion doctrine requires a party to present its claims to the relevant administrative agency for consideration before raising them to the Court. *See Unemployment Compensation Comm'n of Alaska v. Aragon,* 329 U.S. 143, 155 (1946) ("A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action."). In this case, however, there is no absolute requirement of exhaustion in the Court of International Trade. *See Alhambra Foundry Co. v. United States,* 12 CIT 343, 346–47, 685 F. Supp. 1252, 1255–56 (1988). Section 2637(d) of Title 28 of the United States code directs that "the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." By its use of the phrase "where appropriate," Congress vested discretion in the Court to determine the circumstances under which it shall require the exhaustion of administrative remedies. *See Cemex, S.A.,* 133 F.3d at 905. "[E]ach exercise of judicial discretion in not requiring litigants to exhaust administrative remedies" has been characterized as "'an exception to the doctrine of exhaustion.'" *Alhambra Foundry,* 12 CIT at 347, 685 F. Supp. at 1256 (quoting *Timken Co. v. United States,* 10 CIT 86, 93, 630 F. Supp. 1327, 1334 (1986)).

In the past, the Court has exercised its discretion to obviate exhaustion where: (1) requiring it would be futile, *see Rhone Poulenc, S.A. v. United States,* 7 CIT 133, 135, 583 F. Supp. 607, 610 (1984) ("it appears that it would have been futile for plaintiffs to argue that the agency should not apply its own regulation"), or would be "inequitable and an insistence of a useless formality" as in the case where "there is no relief which plaintiff may be granted at the administrative level," *United States Cane Sugar Refiners' Ass'n v. Block,* 3 CIT 196, 201, 544 F. Supp. 883, 887 (1982); (2) a subsequent court decision has interpreted existing law after the administrative determination at issue was published, and

the new decision might have materially affected the agency's actions, see *Timken Co.*, 10 CIT at 93, 630 F. Supp. at 1334; (3) the question is one of law and does not require further factual development and, therefore, the court does not invade the province of the agency, *see id.*; *R.R. Yardmasters of America v. Harris*, 721 F.2d 1332, 1337–39 (D.C. Cir. 1983); and (4) the plaintiff had no reason to suspect that the agency would refuse to adhere to "clearly applicable precedent," *Philipp Bros., Inc. v. United States*, 10 CIT 76, 79–80, 630 F. Supp. 1317, 1320–21 (1986).

As INA readily admits, it has failed to exhaust its administrative remedies. Additionally, there are no reasons or special circumstances here compelling the Court to decline to require exhaustion. INA had the opportunity to bring the issue before Commerce at the administrative level but failed. The only argument INA makes in its defense is that Commerce, on its own initiative, should have determined whether the sales were made outside the ordinary course of trade. The burden is on INA to raise the issue at the administrative level and demonstrate that the home-market sample sales were outside the ordinary course of trade; it is not Commerce's responsibility to shoulder this burden. Commerce's determination is affirmed.

XII. *Commerce's Calculation of a Single Weighted-Average CEP-Profit Rate for Each Class or Kind of Merchandise (INA)*

A. *Background*

In calculating CEP, Commerce must reduce the starting price used to establish CEP by "the profit allocated to the expenses described in paragraphs (1) and (2)" of § 1677a(d) (1994). 19 U.S.C. § 1677a(d)(3). Under 19 U.S.C. § 1677a(f), the "profit" that will be deducted from this starting price will be "determined by multiplying the total actual profit by [a] percentage" calculated "by dividing the total United States expenses by the total expenses." *Id.* § 1677a(f)(1), (2)(A). Section 1677a(f)(2)(B) defines "total United States expenses" as the total expenses deducted under § 1677a(d)(1) and (2), that is, commissions, direct and indirect selling expenses, assumptions and the cost of any further manufacture or assembly in the United States.

Section 1677a(f)(2)(C) establishes a tripartite hierarchy of methods for calculating "total expenses." First, "total expenses" will be "[t]he expenses incurred with respect to the subject merchandise sold in the United States and the foreign like product sold in the exporting country" if Commerce requested such expenses for the purpose of determining NV and CEP. *Id.* § 1677a(f)(2)(C)(i). If category (i) does not apply, then "total expenses" will be "[t]he expenses incurred with respect to the narrowest category of merchandise sold in the United States and the exporting country which includes the subject merchandise." *Id.* § 1677a(f)(2)(C)(ii). If neither category (i) or (ii) applies, then "total expenses" will be "[t]he expenses incurred with respect to the narrowest category of merchandise sold in all countries which includes the subject merchandise." *Id.* § 1677a(f)(2)(C)(iii). "Total actual profit" is based on

whichever category of merchandise is used to calculate "total expenses" under § 1677a(f)(2)(C). *See id.* § 1677a(f)(2)(D).

Commerce calculated the CEP-profit rate on a weighted-average class or kind basis, rejecting INA's request to perform the calculation on a product-specific basis. *See Final Results,* 62 Fed. Reg. at 54,072. In rejecting INA's arguments, Commerce stated the following:

> [N]either the statute nor the SAA requires us to calculate CEP profit on bases more specific than the subject merchandise as a whole. Respondent's suggestion would add a layer of complexity to an already complicated exercise with no increase in accuracy. Furthermore, a subdivision of the CEP-profit calculation would be more susceptible to manipulation.

Id. (citation omitted).

B. *Contentions of the Parties*

INA contends that Commerce erred in calculating CEP-profit rate on a class or kind basis. *See* INA's Br. at 38. INA maintains that Commerce should have calculated CEP-profit rate on a product-specific basis. *See id.* at 39. INA argues that the purposes of the antidumping statute are fulfilled only when "CEP profit for each transaction [is] based only on the actual profit on the U.S. transaction," and Commerce's methodology distorts the CEP calculation by imposing a uniform profit rate on all transactions without regard to differences in actual profit between products. *Id.* at 43.

Commerce argues because the statute does not dispose of the particular issue, the Court must accept Commerce's interpretation of the law if the interpretation is permissible. *See* Def.'s Mem. at 74. Additionally, Commerce argues that INA's argument is not persuasive, and that this Court should follow the court's decision in *Toyota Motor Sales v. United States,* 22 CIT 643, 15 F. Supp. 2d 872 (1998), which addressed a similar issue. *See id.* at 73–75. Torrington agrees with Commerce's position. *See* Torrington's Resp. at 32.

C. *Analysis*

In resolving questions of statutory interpretation, the *Chevron* test requires this Court first to determine whether the statute is clear on its face. If the language of the statute is clear, then this Court must defer to Congressional intent. *See Chevron,* 467 U.S. at 842–43. If the statute is unclear, however, then the question for the Court is whether the agency's answer is based on a permissible construction of the statute. *See id.* at 843; *see also Corning Glass Works,* 799 F.2d at 1565 (finding the agency's definitions must be "reasonable in light of the language, policies and legislative history of the statute").

Section 1677a(f), as Commerce correctly notes, does not direct nor prohibit Commerce from calculating CEP profit on a class or kind basis. Accordingly, the Court's duty under *Chevron* is to review the reasonableness of Commerce's statutory interpretation. *See IPSCO, Inc.,* 965 F.2d at 1061 (quoting *Chevron,* 467 U.S. at 844).

This Court upheld Commerce's refusal to calculate CEP on an LOT-specific basis in *NTN Bearing Corp. of Am.*, 24 CIT at ____, 104 F. Supp. 2d at 133–35, finding it to be reasonable and in accordance with law. The Court examined the language of the statute and concluded that the statute clearly contemplates that, in general, the "narrowest category" will include the class or kind of merchandise that is within the scope of an investigation or review. The Court based its conclusion on its examination of subsections (ii) and (iii) of § 1677a(f)(C)'s "total expense" definition. Both subsections refer to "expenses incurred with respect to the narrowest category of merchandise * * * which includes the subject merchandise." The term "subject merchandise" is defined as "the class or kind of merchandise that is within the scope of an investigation, a review, a suspension agreement, an order under this subtitle or section 1303 of this title, or a finding under the Antidumping Act, 1921." 19 U.S.C. § 1677(25).

Similarly, the Court finds that Commerce reasonably interpreted § 1677a(f) in refusing to apply a narrower subcategory of merchandise such as one based on product. The Court, moreover, agrees with Commerce's conclusion that a "subdivision of the CEP-profit calculation would be more susceptible to manipulation," a result that Congress specifically warned Commerce to prevent. *Final Results*, 62 Fed. Reg. at 54,072. Finally, even if the Court were to assume that a narrower basis for calculating CEP profit would be justified under some circumstances, INA failed to provide adequate factual support of how the CEP-profit calculation was distorted by Commerce's standard methodology.

XIII. *Treatment of Imputed Credit and Inventory Carrying Costs in the Calculation of CEP Profit (INA)*

A. *Background*

INA reported United States sales that Commerce treated as CEP sales pursuant to 19 U.S.C. § 1677a(b), and Commerce deducted an amount for profit allocated to the expenses enumerated by 19 U.S.C. § 1677a(d)(1) and (2). *See* 19 U.S.C. § 1677a(d)(3). In the profit calculation, Commerce excluded imputed expenses and carrying costs from the "total actual profit" calculation, defined in § 1677a(f)(2)(D), and from the "total expenses" calculation, defined in § 1677a(f)(2)(C), but included them in the "total United States expenses" calculation, defined in § 1677a(f)(2)(B). INA objected to the omission of imputed expenses and carrying costs from "total actual profit" and "total expenses," and Commerce responded with the following:

> [S]ections [1677(f)(1) and 1677(f)(2)(D)] of the Tariff Act state that the per-unit profit amount shall be an amount determined by multiplying the total actual profit by the applicable percentage (ratio of total U.S. expenses to total expenses) and that the total actual profit means the total profit earned by the foreign producer, exporter, and affiliated parties. In accordance with the statute, we base the calculation of the total actual profit used in calculating the per-unit profit amount for CEP sales on actual revenues and expenses recog-

> nized by the company. In calculating the per-unit cost of the U.S. sales, we have included net interest expense. Therefore, we do not need to include imputed interest expenses in the "total actual profit" calculation since we have already accounted for actual interest in computing this amount under section [1677(f)(1)]. When we allocated a portion of the actual profit to each CEP sale, we have included imputed credit and inventory carrying costs as part of the total U.S. expense allocation factor. This methodology is consistent with section [1677(f)(1)] of the statute, which defines "total United States expense" as the total expenses described under section [1677(d)(1) and (2)]. Such expenses include both imputed credit and inventory carrying costs.

Final Results, 62 Fed. Reg. at 54,072.

B. *Contentions of the parties*

INA complains that "[i]mputed interest either is or is not an expense for purposes of CEP profit calculation," and that "[i]gnoring imputed interest expense in calculating the profit rate and then applying that profit rate to imputed interest expense in calculating a profit amount results in deduction of imputed expense twice in determining CEP, once as expense and once as a component of profit." INA's Br. at 45. INA maintains that Commerce should include United States credit expense and inventory carrying costs in total expenses. *See id.*

Commerce maintains that the statute does not define "total expenses" in the same manner as "total United States expenses." *See* Def.'s Mem. at 81. Commerce argues that it has always deducted imputed expenses from the starting price in CEP transactions and, "[f]or this reason, in determining 'total United States expenses,[']Commerce includes imputed selling expenses, such as imputed credit and inventory carrying costs." *Id.* at 82. Contrary to INA's contention, Commerce argues that it does not deduct imputed expenses twice. *See id.* at 80.

Commerce contends that the provision for "total expenses" merely encompasses "all expenses * * * 'which are incurred by or on behalf of the foreign producer and foreign exporter * * * with respect to the production and sale of such merchandise.'" *Id.* at 82 (quoting 19 U.S.C. § 1677a(f)(2)(C)). Commerce argues that if "Congress intended that Commerce utilize the same types of expenses for both 'total United States expenses' and 'total expenses,' it would have made that intent clear," and would not have assigned different definitions for each term. *Id.*

Commerce also maintains that it did not include imputed expenses in "total expenses" since Commerce is required to calculate "total actual profit" on the same basis as "total expenses." *See id.* at 83. Torrington generally agrees with Commerce. *See* Torrington's Resp. at 34.

C. *Analysis*

To determine whether Commerce's interpretation and application of the antidumping statute is "in accordance with law," the Court must undertake the two-step analysis prescribed by *Chevron*. Under the first

step, the Court reviews Commerce's construction of a statutory provision to determine whether "Congress has directly spoken to the precise question at issue." *Id.* at 842. "To ascertain whether Congress had an intention on the precise question at issue, [the Court] employ[s] the 'traditional tools of statutory construction.'" *Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998) (citing *Chevron*, 467 U.S. at 843 n.9). "The first and foremost 'tool' to be used is the statute's text, giving it its plain meaning. Because a statute's text is Congress's final expression of its intent, if the text answers the question, that is the end of the matter." *Id.* (citations omitted).

The Court finds that Commerce improperly excluded imputed inventory and carrying costs from "total expenses" when it had included these expenses in "total United States expenses." The plain text of 19 U.S.C. § 1677a provides that Commerce must include imputed credit and inventory carrying costs in "total expenses" when they are included in "total United States expenses." Section 1677a(f)(2)(B) defines "total United States expenses" as the total expenses deducted under § 1677a(d)(1) and (2), that is, commissions, direct and indirect selling expenses, assumptions, and the cost of any further manufacture or assembly in the United States. Section 1677a(f)(2)(C) specifies that:

> [t]he term "total expenses" means *all* expenses in the first of the following categories which applies and which are incurred by or on behalf of the foreign producer and foreign exporter of the subject merchandise and by or on behalf of the United States seller affiliated with the producer or exporter with respect to the production and sale of such merchandise * * *.

(emphasis added). Commerce determined that the applicable category of expenses to be used for calculating "total expenses" is § 1677a(f)(2)(C)(i), and it consists of all of "[t]he expenses incurred with respect to the subject merchandise sold in the United States and the foreign like product sold in the exporting country." 19 U.S.C. § 1677a(f)(2)(C)(i)).

Thus, "total United States expenses" are certain enumerated expenses "incurred by or for the account of the producer or exporter, or the affiliated seller in the United States," *see* § 1677a(d)(1),(2), while "total expenses," in this instance, include

> all expenses * * * incurred by or on behalf of the foreign producer and foreign exporter of the subject merchandise and by or on behalf of the United States seller affiliated with the producer or exporter * * * with respect to the subject merchandise sold in the United States and the foreign like product sold in the exporting country * * *.

§ 1677a(f)(2)(C)(i). Reading §§ 1677a(d) and (f) together makes it apparent that "total expenses" equals "total United States expenses," that is, those expenses incurred in the United States, plus those expenses incurred in Germany, to produce and sell the subject merchandise in the United States. "Total United States expenses" is a subset of "total ex-

penses." Thus, since Commerce determined that imputed inventory and carrying costs were to be included in "total United States expenses," they must be included in "total expenses" as well.

Because the text of the statute resolves the issue, it is unnecessary to proceed any further. Accordingly, the Court remands this issue to Commerce. Commerce is directed to include all expenses included in "total United States expenses" in the calculation of "total expenses."

XIV. *Treatment of Certain Rebates and Billing Adjustments Reported by SKF and FAG*

A. *Background*

SKF's Home-market Support Rebates

SKF reported certain home-market support rebates on a customer-specific basis. SKF granted this rebate to its customers, that is, its distributor/dealers, based on invoices from the distributor/dealer to the distributor/dealer's customer. *See* SKF's Mem. Resp. to Torrington's Mot. J. Agency R. Mem. ("SKF's Resp.") at 36. In accepting SKF's reporting of home-market support rebates on a customer-specific basis, Commerce stated the following:

> We find that SKF Germany's allocation methodologies are not unreasonably distortive. Due to the nature of the support rebates, transaction-specific reporting is not appropriate. SKF Germany grants these rebates to distributors/dealers to ensure that they obtain a minimum profit level on sales to select customers. Hence, because SKF Germany does not issue these rebates based on specific sales to the distributor/dealers but rather on the sales of the distributors/dealers, SKF Germany cannot report transaction-specific rebate amounts. Rather, SKF Germany has allocated the rebates it granted to a specific customer over all sales to that customer. SKF Germany's allocation methodology is not unreasonably distortive, as we are satisfied that each adjustment was granted in proportionate amounts with respect to the value of sales of in-scope and out-of-scope merchandise.

Final Results, 62 Fed. Reg. at 54,051–52.

SKF's Home-market Billing Adjustment Two

SKF reported home-market billing adjustment two on a customer-specific basis. Billing adjustment two was related to mulitple invoices, products or invoice lines and was allocated by customer number by "totaling the credits and debits issues to a customer number and dividing this total by total sales to that customer number." SKF's Resp. at 40.

In accepting SKF's methodology, Commerce stated the following:

> SKF Germany could not tie these adjustments to a specific transaction because the billing adjustments it reported in this field were part of credit or debit notes, issued to the customer, that related to multiple invoices, products, or invoice lines. In these cases, the most feasible reporting methodology that SKF Germany could use was a customer-specific allocation, given the large volume of transaction involved in these AFB reviews and the time constraints im-

> posed by the statutory deadlines. Furthermore, we found that the products which received the adjustment were similar in terms of value, physical characteristics, and the manner in which they were sold. For these reasons, we find that this methodology is not unreasonably distortive.

Final Results, 62 Fed. Reg. at 54,052.

FAG's Home-market Rebate

FAG reported some rebates granted in the home market were "payable in connection with purchases of certain types of products, or for purchases made during certain select periods." Questionnaire Resp. for 1995–96 Admin. Review Sec. B (9/9/96) (Case No. A–428–801) at 22. To calculate the rebate for each eligible customer, "the rebate amount actually paid in 1995 or for 1995 sales was divided by total sales to that customer in 1995 that generated the rebate," and the "resulting factor was then applied to the unit price of sales reported for that customer to derive a rebate amount in DM/unit." *Id.*

In accepting FAG's rebates, Commerce stated the following:

> FAG allocated its rebates on a customer-specific basis over sales only of those products that actually received rebates. Therefore, we determine that FAG's methodology for reporting rebates is reasonable and not distortive, and, in accordance with our policy, we have accepted FAG's [home-market] rebates as reported.

Final Results, 62 Fed. Reg. at 54,051.

B. Contentions of the Parties

Torrington alleges that Commerce improperly accepted SKF's and FAG's home-market support rebates and home-market billing adjustments. Torrington maintains that the CAFC has clearly defined "direct" adjustments to price as those that "vary with the quantity sold, or that are related to a particular sale," and Commerce cannot treat adjustments that do not meet this definition as direct. Torrington's Mem. Supp. Mot. J. Agency R. ("Torrington's Mem.") at 10 (citing *Torrington Co. v. United States ("Torrington CAFC"),* 82 F.3d 1039, 1050 (Fed. Cir. 1996) (quotations omitted)). Torrington contends that here Commerce "redefined 'direct' to achieve what *Torrington CAFC* had previously disallowed" by allowing respondents to report allocated post-sale price adjustments ("PSPAs") if they acted to the best of their abilities in light of their record-keeping systems and the results were not unreasonably distortive. *Id.* at 12. Torrington acknowledges that this Court has already approved of Commerce's practice as applied under post-URAA law in *Timken Co. v. United States ("Timken"),* 22 CIT 621, 16 F. Supp. 2d 1102 (1998), but asks the Court to reconsider its approval. *See id.* at 16.

Furthermore, Torrington maintains that the amendments to the URAA did not modify the distinction between direct and indirect adjustments established under pre-URAA law such as *Torrington CAFC. See* Torrington's Mem. at 14 (citing 19 U.S.C. § 1677a(d)(1)(B), (D) (1994) and § 1677b(a)(7)(B) (1994)). Torrington is not convinced that the SAA contradicts its contentions. *See id.* at 14–15 (citing SAA at 823–24).

Torrington also contends that even under its new methodology, Commerce's determination was not supported by substantial evidence inasmuch as respondents failed to show that: (1) their reporting methods did not result in distortion; and (2) they put forth their best efforts to report the information on a more precise basis. *See id.* at 21. Torrington emphasizes that respondents have the burden of showing non-distortion and best efforts, and having failed to carry the burden, they must not benefit from the adjustment. *See id.* at 22. Torrington, therefore, requests that this Court reverse Commerce's determination with respect to the various PSPAs and remand the case to Commerce with instructions to disallow all of the claims. *See id.* at 27.

Commerce responds that its treatment of the adjustments is consistent with current law. Even though the adjustments were not reported in a transaction-specific manner, Commerce accepted them as part of its new policy to accept allocated adjustments where it is not feasible for the respondent to report them on a transaction-specific basis and the respondent has acted to the best of its ability. Additionally, Commerce examines whether the allocation method used is not unreasonably distortive pursuant to 19 U.S.C. § 1677m(e).

Commerce argues that Torrington erred in relying on *Torrington CAFC* because the case does not stand for the proposition that direct price adjustments may only be accepted when they are reported on a transaction-specific basis. *See* Def.'s Mem. at 115. Rather, the *Torrington CAFC* court "merely overturned a prior Commerce practice * * * of treating certain allocated price adjustments as indirect expenses," *id.* (citing *Torrington CAFC,* 82 F.3d at 1047–51), and does "not address the propriety of the allocation methods" used in reporting the price adjustments in question, *id.* at 115–17 (quoting *Final Results,* 62 Fed. Reg. at 54,050). Also contrary to Torrington's assertion, Commerce did not consider *Torrington CAFC* as addressing proper allocation methodologies; rather, Commerce only viewed *Torrington CAFC* as holding that "Commerce could not treat as indirect selling expenses 'improperly' allocated price adjustments." *Id.* at 117–18. Commerce notes that pursuant to its new methodology, it does not consider price adjustments to be any type of selling expense, either direct or indirect and, therefore, Torrington's argument is not only without support, but also inapposite to *Torrington CAFC. See id.* at 119.

Additionally, Commerce argues that its findings are supported by substantial evidence. *See id.* at 139. With respect to SKF's rebates and billing adjustment two, Commerce maintains that: "(1) SKF had reported the adjustments on the most specific basis possible and, thus, had cooperated to the best of its ability; and (2) the allocation method was not distortive." *Id.* at 121–22. Although Commerce did not verify the data underlying this review, Commerce verified the treatment of SKF's rebates in the sixth review of AFBs and, moreover, found no evidence of distortion in this review. *See id.* at 122.

Commerce also argues that it properly accepted FAG's home-market rebates. *See id.* at 127. Commerce found no evidence that FAG's adjustments were distortive. *See id.* at 129. Commerce determined that "FAG appropriately attributed the rebates to the sales by customer per the type of merchandise that received rebates and did not seek to shift the rebate allocation to other sales." *Id.*

SKF and FAG generally concur with Commerce's position. *See* SKF's Resp.; FAG's Mem. Resp. to Torrington's Mot. J. Agency R.

C. *Analysis*

Commerce's decision to accept SKF's and FAG's billing adjustments and rebates was supported by substantial evidence and was fully in accordance with the post-URAA statutory language, as well as with the SAA that accompanied the enactment of the URAA because: (1) Commerce reasonably determined that the adjustments were reliable and could not be reported more specifically; (2) Commerce properly determined that respondents acted to the best of their abilities in reporting the adjustments; and (3) Commerce properly accepted the allocation methodologies of the respondents after carefully reviewing the differences between such merchandise and ensuring that the allocations were not unreasonably distortive. *See Final Results,* 62 Fed. Reg. at 54,051–52.

After the enactment of the URAA, Commerce reevaluated its treatment of PSPAs, and since that time it treats them as adjustments to price and not as selling expenses. Indeed, Commerce's treatment of the home-market support rebates, early-payment discounts and billing adjustments as adjustments to price instead of selling expenses is the issue left unanswered by the pre-URAA cases upon which Torrington relies, namely, *Torrington CAFC; Koyo Seiko Co. v. United States ("Koyo"),* 36 F.3d 1565 (Fed. Cir. 1994); and *Consumer Prods. Div., SCM Corp. v. Silver Reed Am., Inc.("Consumer Products"),* 753 F.2d 1033 (Fed. Cir. 1985).[7]

The Court disagrees with Torrington that *Torrington CAFC* mandates that direct price adjustments may only be accepted when they are reported on a transaction-specific basis. Rather, *Torrington CAFC* merely overturned a prior Commerce practice of treating certain allocated price adjustments as indirect selling expenses and did not address the propriety of the allocation methods that respondents used in reporting the price adjustments in question. Although (1) "Commerce treated rebates and billing adjustments as selling expenses in preceding reviews under pre-URAA law," and (2) "previously decided that such adjust-

[7] In *Torrington CAFC,* the Court of Appeals did not hold that billing adjustments must be treated as selling expenses. The *Torrington CAFC* court specifically noted that it was treating billing adjustments as selling expenses only because there was no argument offered suggesting otherwise, and the issue whether such treatment was appropriate remained open. *Torrington CAFC,* 82 F.3d at 1050 n.15. Torrington's reliance on *Koyo* and *Consumer Products* is equally unjustified. The *Koyo* court, citing *Consumer Products,* noted that "[d]irect selling expenses are 'expenses which vary with the quantity sold, such as commissions'" and did not address the issue of billing adjustments. *Koyo,* 36 F.3d at 1569 n.4 (quoting *Consumer Products,* 753 F.2d at 1035). Because these cases address Commerce's treatment of selling expenses, and Commerce did not treat the adjustments at issue as selling expenses, these cases are irrelevant to the issue at hand.

ments are selling expenses and, therefore, should not be treated as adjustments to price," this did not "preclude Commerce's change in policy or this Court's reconsideration of its stance in light of the newly-amended antidumping statute [(that is, 19 U.S.C. § 1677m(e) (1994))]." *Timken,* 16 F. Supp. 2d at 1107. "Neither the pre-URAA nor the newly-amended statutory language imposes standards establishing the circumstances under which Commerce is to grant or deny adjustments to NV for PSPAs." *Id.* at 1108 (citing *Torrington CAFC,* 82 F.3d at 1048). Moreover, 19 U.S.C. § 1677m(e) "specifically directs that Commerce shall not decline to consider an interested party's submitted information if that information is necessary to the determination but does not meet all of Commerce's established requirements, if the [statute's] criteria are met." *Id.*

Commerce applied its post-URAA methodology to analyze adjustments to price, explaining that Commerce accepted PSPAs as direct adjustments to price if Commerce determined that a respondent, in reporting these adjustments, acted to the best of its ability to associate the adjustment with the sale on which the adjustment was made, rendering its reporting methodology not unreasonably distortive. *See Final Results,* 62 Fed. Reg. at 54,049. In evaluating the degree to which an allocation over scope and non-scope merchandise may be distortive, Commerce examines "the extent to which the out-of-scope merchandise included in the allocation pool is different from the in-scope merchandise in terms of value, physical characteristics, and the manner in which it is sold." *Id.* Torrington argues that Commerce's methodology is unlawful. Torrington is incorrect. Although the URAA does not compel Commerce's new policy on price adjustments, the statute does not prohibit Commerce's new practice.

Commerce's "change in policy * * * substitutes a rigid rule with a more reasonable method that nonetheless ensures that a respondent's information is reliable and verifiable." *Timken,* 16 F. Supp. 2d at 1108. Commerce's decision to accept SKF's and NTN's allocated adjustments to price is acceptable, "especially * * * in light of the more lenient statutory instructions of [19 U.S.C. §] 1677m(e)." *Id.* Accordingly, "Commerce's decision to accept the PSPAs * * * is fully in accordance with the post-URAA statutory language and directions of the SAA," and the decision to accept SKF's and FAG's adjustments was reasonable even though the adjustments were not reported on a transaction-specific basis and even though the allocations included rebates on non-scope merchandise. *Id.*

Torrington argues that the post-URAA statute retains the distinction between "direct" and "indirect" expenses and, therefore, does not permit Commerce to alter its treatment of adjustments to price. *See* Torrington's Mem. at 14. Torrington trivializes the statutory changes that prompted Commerce to reevaluate its treatment of adjustments and consequently revise its regulations. Because Commerce now treats PSPAs as adjustments to price rather than selling expenses, the distinc-

tion between direct versus indirect selling expenses is no longer relevant for the purpose of determining the validity of allocated price adjustments. One of the goals of Congress in passing the URAA was to liberalize certain reporting requirements imposed on respondents in antidumping reviews. Such intent is evident both in the amendments enacted by the URAA and in the SAA. The URAA amended the antidumping law to include a new subsection, 19 U.S.C. § 1677m(e). The provision states that:

> In reaching a determination under [19 U.S.C.] section 1671b, 1671d, 1673b, 1673d, 1675, or 1675b * * * the administering authority and the Commission shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority or the Commission, if—
>
> (1) the information is submitted by the deadline established for its submission,
>
> (2) the information can be verified,
>
> (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
>
> (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority or the Commission with respect to the information, and
>
> (5) the information can be used without undue difficulties.

19 U.S.C. § 1677m(e). This section of the statute liberalized Commerce's general acceptance of data submitted by respondents in antidumping proceedings by directing Commerce not to reject data submissions once Commerce concludes that the specified criteria are satisfied.[8]

Next, Torrington suggests that Commerce has accepted the adjustments without requiring respondents to carry the burden of proving that the adjustments are non-distortive. *See* Torrington's Mem. at 22. This argument is without merit. As a routine part of its antidumping practice, Commerce accepts a range of reporting methodologies and allocations adopted by respondents. The mere acceptance of an adjustment as reported cannot be a sufficient ground for rejecting Commerce's decision. It would be anomalous indeed to expect a respondent to provide Commerce, in addition to the information on the basis of which Commerce could conclude that the respondent's reporting methods are not distortive, with proof of the validity of Commerce's determination of that sort. Such a scheme would effectively allow the respondent to bind Commerce, restricting Commerce's inherent power to investigate, examine and render a decision.

In determining whether SKF's and FAG's allocation over scope and non-scope merchandise was unreasonably distortive, Commerce rea-

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[8] Consistent with § 1677m(e), the SAA states that "[t]he Administration does not intend to change Commerce's current practice, sustained by the courts, of allowing companies to allocate these expenses when transaction-specific reporting is not feasible, provided that the allocation method used does not cause inaccuracies or distortions." SAA at 823–24. Therefore, the statute and the accompanying SAA both support Commerce's use of allocations in circumstances such as those present here.

sonably has not required respondents to demonstrate the non-distortive nature of the allocation directly, for example, by compelling them to identify separately the adjustments on scope merchandise and compare them to the results of allocations over both scope and non-scope merchandise. Such a burdensome exercise would defeat the entire purpose underlying the more flexible reporting rules, by compelling the respondent to go through the enormous effort that the new rules were intended to obviate. Rather, Commerce has adopted criteria by which Commerce itself could determine whether an allocation over scope and non-scope merchandise was likely to cause unreasonable distortions.

In the case at hand, Commerce's determination with respect to SKF's rebates and billing adjustments was reasonable. Commerce premised its conclusion on its finding that transaction-specific reporting is not appropriate for the rebates due to their nature, that is, because they are granted on the basis of sales *by* the distributor/dealer rather than on sales *to* the distributor/dealer. *Final Results,* 62 Fed. Reg. at 54,041. Commerce also found that transaction-specific reporting was not feasible for the billing adjustment since it related to multiple invoices, products, or invoice lines. *See id.* at 54,042. For both adjustments, Commerce found that the allocation methodologies used were not distortive, and that SKF acted to the best of its ability in reporting the information inasmuch as more specific reporting was not feasible. *See id.* at 54,051–52.

Commerce also properly accepted FAG's home-market rebates. FAG's home-market rebates were granted on a customer-specific basis, and only on sales of the products that actually received rebates. *See id.* at 54,041. Commerce also found that the method was not unreasonably distortive. *See id.*

Torrington asserts that Commerce improperly determined that SKF and FAG acted to the best of their ability in reporting adjustments. *See* Torrington's Mem. at 23–26. Torrington's assertion is without merit. When respondents' adjustments were granted over both scope and non-scope merchandise without reference to any particular model or transaction, Commerce could not have reasonably expected them to be recorded or reported to Commerce in a manner more specific than that which was used. It was equally appropriate for Commerce to consider, as a part of its decision whether respondents acted to the best of their ability in reporting the adjustments, the volume of adjustments when deciding whether it is feasible to report these adjustments on a more specific basis. In light of the considerable size of their databases, Commerce reasonably found that "given the extremely large volume of transactions involved in these AFBs reviews[,] [i]t is inappropriate to reject allocations that are not unreasonably distortive in favor of facts otherwise available where a fully cooperating respondent is unable to report the information in a more specific manner." *Final Results,* 62 Fed. Reg. at 54,049. The large volume of data is precisely one of the factors that one would expect Commerce to consider in deciding whether a respondent has acted to the best of its ability in reporting a given adjustment.

In sum, the Court finds that Commerce's decision to accept SKF's and FAG's reported home-market adjustments was supported by substantial evidence and was fully in accordance with the post-URAA statutory language and the SAA. The record demonstrates that the requirements of 19 U.S.C. § 1677m(e) were satisfied by the respondents in that: (1) the reported adjustments were submitted in a timely fashion, *see* 19 U.S.C. § 1677m(e)(1); (2) the information submitted can be verified by Commerce, *see* 19 U.S.C. § 1677m(e)(2); (3) the respondents' information was not so incomplete that it could not serve as a basis for reaching a determination, *see* 19 U.S.C. § 1677m(e)(3); (4) respondents demonstrated that they acted to the best of their abilities in providing the information and meeting Commerce's new reporting requirements, *see* § 1677m(e)(4); and (5) there was no indication that the information was incapable of being used without undue difficulties. *See* § 1677m(e)(5).

Commerce's determinations with respect to SKF and FAG were also consistent with the SAA. The Court agrees with Commerce's finding in the *Final Results* that given the extremely large volume of transactions, the level of detail contained in normal accounting records, and time constraints imposed by the statute, the reporting and allocation methodologies were reasonable. This is consistent with the SAA directive under § 1677m(e), which provides that Commerce "may take into account the circumstances of the party, including (but not limited to) the party's size, its accounting systems, and computer capabilities." SAA at 865. Thus, the Court finds that Commerce properly considered the ability of SKF and FAG to report its billing adjustments on a more specific basis. Accordingly, the Court concludes that Commerce's acceptance of SKF's and FAG's reported adjustments was supported by substantial evidence and fully in accordance with law.

CONCLUSION

This case is remanded to Commerce to: (1) annul all findings and conclusions made pursuant to the duty-absorption inquiry conducted for the subject review in accordance with this opinion; (2) attempt to match United States sales to similar home-market sales before resorting to CV; (3) reconsider its determination to deny a downward billing adjustment to INA on its home-market sales; (4) clarify how it complied with the statutory framework of 19 U.S.C. §§ 1677e, 1677m for using facts available and applying an adverse inference and if it determines it did not adhere to all of the statutory prerequisite conditions, to give INA the opportunity to remedy or explain any deficiency regarding its alleged sample sales; and (5) include all expenses included in "total United States expenses" in the calculation of "total expenses" for INA.

(Slip Op. 01–77)

NEENAH FOUNDRY CO., ET AL., PLAINTIFFS *v.* UNITED STATES OF AMERICA AND UNITED STATES INTERNATIONAL TRADE COMMISSION, DEFENDANTS, AND BENGAL EXPORT CORP., ET AL., INTERVENOR-DEFENDANTS

Court No. 99–11–00716

[Plaintiffs' motion for judgment on the agency record denied; action dismissed.]

(Decided June 25, 2001)

Collier Shannon Scott, PLLC (Paul C. Rosenthal, Robin H. Gilbert, Kathleen W. Cannon and *Lynn Duffy Maloney)* for the plaintiffs.

Lyn M. Schlitt, General Counsel, *James A. Toupin,* Deputy General Counsel, and *Charles A. St. Charles,* Attorney-Advisor, for the defendant United States International Trade Commission.

Cameron & Hornbostel LLP (Dennis James, Jr.) for the intervenor-defendants.

OPINION AND ORDER

AQUILINO, *Judge:* This action contests the "sunset-review" determination of the International Trade Commission ("ITC") pursuant to 19 U.S.C. §1675(c)(1) (1995) that

> revocation of the countervailing duty order on iron metal castings from India would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

Iron Metal Castings From India; Heavy Iron Construction Castings From Brazil; and Iron Construction Castings From Brazil, Canada, and China, 64 Fed.Reg. 58,442 (Oct. 29, 1999). This decision caused the International Trade Administration, U.S. Department of Commerce ("ITA") to publish its notice of *Revocation of Countervailing Duty Order: Iron Metal Castings From India,* 64 Fed.Reg. 61,602 (Nov. 12, 1999), prior to which the same plaintiffs as appear herein had commenced a separate action for judicial review of the final results of the ITA's sunset review. *See generally Neenah Foundry Co. v. United States,* 25 CIT ____, ____ F.Supp.2d ____ (April 2, 2001).

I

The ITC rendered the foregoing determination qua India over the dissents of two of its six voting members. Those comprising the majority refused to cumulate the imports from that land with the merchandise from Brazil, Canada and China, notwithstanding contrary Commission resolution of the reviews of all the other duty orders covering castings from those three nations. *See* 64 Fed.Reg. at 58,442. Chairman Bragg and Commissioners Crawford and Askey concluded that

> revocation of the order with respect to heavy construction castings from India would have no discernible adverse impact on the U.S. industry and, therefore, do not cumulate subject heavy construction castings from India with the subject heavy iron construction castings from Canada, Brazil or China.

Iron Metal Castings From India; Heavy Iron Construction Castings From Brazil; and Iron Construction Castings From Brazil, Canada, and China, USITC Pub. 3247, pp. 12–13 (Oct. 1999). The fourth commissioner, Stephen Koplan, did not join in this finding of "no discernible adverse impact on the U.S. industry" but did decline to cumulate the imports based on his analysis of relevant conditions of competition.

The plaintiffs now argue in their motion for judgment upon the agency record filed pursuant to CIT Rule 56.2 that this action "raises several important issues of first impression concerning certain commissioners' interpretations of the cumulation provision applicable in 'sunset' revocation proceedings", to wit:

> * * * In exercising his discretion * * * under the guise of considering "conditions of competition," Commissioner Koplan conducted an unlawful circular analysis of the effects of the imports on an individual-country basis in a manner that mooted the principle of cumulation. * * *
>
> * * * * * * *
>
> Likewise, Commissioner Askey analyzed cumulation in a manner contrary to the statute. Although the statute precludes the Commission from cumulating when it finds that imports are likely to have "no" discernible adverse impact, Commissioner Askey has wrongly interpreted this provision to mean that she may cumulate only when the record shows that imports will have "a" discernible adverse impact. As a result, Commissioner Askey has at once raised the burden for cumulating, altered the statutory standard, and created a pre-condition for cumulation that Congress did not intend. * * *
>
> Commissioner Crawford, too, has erred in her decision not to cumulate. In particular, [she] violated basic tenets of administrative law by failing to adequately explain her reasons not to cumulate, stating in one instance simply that she "declined to exercise her discretion to cumulate" imports from Brazil and China with the remaining imports and providing no further explanation. * * *

Plaintiffs' Rule 56.2 Brief, pp. 9–11.

A

The court's jurisdiction to decide this action is pursuant to 19 U.S.C. §1516a(a)(2)(B)(iii) and 28 U.S.C. §§ 1581(c), 2631(c). And, whatever the issues raised herein, the ITC's determination must be affirmed unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law". 19 U.S.C. §1516a(b)(1)(B)(i). Moreover, the rule has been that, in

> reviewing an agency's construction of a statute that it administers, this court addresses two questions outlined by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 * * * (1984). The first question is "whether Congress has directly spoken to the precise question at issue." *Id.* at 842 * * *. If so, this court and the agency "must give effect to the unambiguously expressed intent of Congress." *Id.* at 843 * * *. If,

however, Congress has not spoken directly on the issue, this court addresses the second question of whether the agency's interpretation "is based on a permissible construction of the statute." *Id.*

"To survive judicial scrutiny, an agency's construction need not be the only reasonable interpretation or even the most reasonable interpretation." *Koyo Seiko [Co. v. United States]*, 36 F.3d [1565,] 1570 [Fed.Cir. 1994]. Thus, when faced with more than one reasonable statutory interpretation, "a court must defer to an agency's reasonable interpretation * * * even if the court might have preferred another." *NSK Ltd. v. United States,* 115 F.3d 965, 973 (Fed.Cir. 1997)(citations omitted).

U.S. Steel Group v. United States, 225 F.3d 1284, 1285–86 (Fed.Cir. 2000). *Compare United States v. Mead Corp.,* 533 U.S. ____, ____ S.Ct. ____ (June 18, 2001).

(1)

The statute underlying this action is the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103–465, 108 Stat. 4809 (Dec. 8, 1994), section 220 of which established five-year or "sunset" reviews of outstanding antidumping- and countervailing-duty orders to be conducted pursuant to:

Special rules for section 1675(b) and 1675(c) reviews

(a) Determination of likelihood of continuation or recurrence of material injury

(1) In general

In a review conducted under section 1675(b) or (c) of this title, the Commission shall determine whether revocation of an order * * * would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. The Commission shall consider the likely volume, price effect, and impact of imports of the subject merchandise on the industry if the order is revoked or the suspended investigation is terminated. * * *

19 U.S.C. §1675a(a). In addition to explaining in further detail the factors the ITC is to consider in evaluating the likely volume of imports and their price effect and impact on a domestic industry, the statute provides for cumulation in sunset reviews as follows:

For purposes of this subsection, the Commission may cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which reviews under section 1675(b) or (c) of this title were initiated on the same day, if such imports would be likely to compete with each other and with domestic like products in the United States market. The Commission shall not cumulatively assess the volume and effects of imports of the subject merchandise in a case in which it determines that such imports are likely to have no discernible adverse impact on the domestic industry.

19 U.S.C. §1675a(a)(7).

B

In this matter, the ITC found that the prerequisites of initiation of reviews on the same day and competition in the U.S. market were met, and those findings are not at issue before the court. As for the other express limitation on Commission discretion to cumulate, namely, whenever subject "imports are likely to have no discernible adverse impact on the domestic industry", Commissioner Koplan was of the view that

> current volumes of subject imports from India, even with the countervailing duty order in place, exceed levels that would satisfy the "no discernible adverse impact" provision. There is no evidence in the record indicating that subject imports from India are likely to decline significantly upon revocation * * *. [W]ith at least a 17 percent share of the market, I cannot conclude that the subject imports from India are likely to have * * * no discernible adverse impact on the domestic industry if the * * * duty order is revoked.

USITC Pub. 3247, p. 28. Nonetheless, the commissioner declined to comulate, explaining that

> the conditions of competition would be significantly different for subject imports from India as opposed to those for subject imports from China, Brazil and Canada if the respective orders were revoked. Consequently, I find that it is not appropriate to assess cumulatively the likely volume and price effects of subject imports from India with those * * * from China, Brazil, and Canada.

Id. at 31. His discussion of such conditions of competition includes a comparative analysis of current and likely margins, volume, and price effects:

> * * * [T]he magnitude of the antidumping duty margins, and likely margins of dumping, for imports from China, Brazil, and, to a lesser extent Canada, are all significantly higher than the current and likely countervailing duty rate on subject imports from India. These are significant differences in the conditions of competition for subject imports from India as opposed to subject imports from China, Brazil, and Canada.
>
> Given this central condition of competition, I join the Commission's conclusion that neither the volume nor the price of subject imports of heavy metal castings from India are likely to significantly change if the countervailing duty order is revoked. Unlike the other subject countries, the current countervailing duty order has not had a material effect on the volume or price of subject imports from India. The Commerce Department, in its review of that order, found that the likely prevailing countervailable subsidy rate would be unchanged from the current rate. Viewed in this light, the capacity and capacity utilization figures for the Indian producers are not probative of the likely volume of subject imports if the order is revoked. The levels and ratios of their home market shipments and U.S. and third country exports have been largely unaffected by the existing countervailing duty order. Thus, unlike the other subject imports which are being restrained by the respective orders, current capacity and capacity utilization rates for producers in India

are not indicative of whether exports to the United States likely would increase significantly if the order were revoked. In other words, since the subject Indian imports are not being restrained by the order, the current level of capacity utilization at the Indian foundries does not bear on the likely volume of shipments to the U.S. if the order is revoked.

The record does not show that prices of subject imports from India had a significant effect on domestic prices during the period examined. In this regard, * * * the Indian government Export Promotion Council maintains a price floor for exports to ensure fair market prices (and the antidumping duty order for India was revoked). More important, perhaps reflecting these price floors, our pricing data show that while subject Indian import prices generally were stable throughout the period examined, domestic prices fluctuated significantly. These data suggest that domestic prices were not adversely affected by the relative levels of subject Indian import prices. To some extent, the underselling by subject Indian producers can be explained by the fact that the quality of much of that product is perceived to be inferior to the domestic product. Indeed, if the products were generally comparable, one would expect that widespread underselling would result in increased import volume and market penetration, not the declining volume and share experienced by subject imports from India at the end of the period examined. In sum, I find that subject Indian import volume and prices have been largely unaffected by the existing order and are likely to continue to be stable if the order is revoked.

In light of the fact that the Commission received no responses from respondent interested parties regarding the reviews on heavy metal castings from China, Brazil, and Canada, the analysis of the conditions of competition concerning those subject imports must, of necessity, be based principally on the best information available in the record. The record evidence leads me to conclude that the conditions of competition among those subject countries would be quite similar, and distinct from those relating to subject imports from India. Those three subject countries are all restrained to a significant degree by the respective antidumping duty orders and the Commerce Department has determined that all are likely to have significant dumping margins in the event of revocation. Thus, in stark contrast to the subject imports from India, the existing orders have effectively eliminated or, in the case of Canada, severely curtailed subject imports from those countries. For this reason, as discussed in the Commission's opinion in which I join, the enormous capacity and substantial excess capacity in those three countries leads me to conclude that subject imports from those countries are all likely to face the same conditions of competition upon revocation of the respective orders. As a result, unlike subject imports from India, I find that removal of the existing orders covering subject merchandise from China, Brazil, and Canada would result in substantial changes in the volume of subject imports from those countries.

In addition, unlike subject imports from India, subject imports from China, Brazil, and Canada are not covered by stable minimum

> price floors. Accordingly, the record indicates that prices for subject imports from those three countries are likely to fluctuate to a significant degree if the respective orders are revoked. Finally, unlike subject imports from India, the record does not contain any indication that the quality of heavy metal castings produced in China, Brazil, or Canada differs significantly from that produced by the domestic industry.[1]

(1)

Whether such analysis in the context of cumulation was an abuse of discretion is the primary issue now before the court. To begin with, while URAA added sunset reviews to the Trade Agreements Act in 1994, cumulation predates that moment. In fact, before any statutory provision, the ITC had discretion in determining whether to cumulate data on volume and effects of subject imports from different countries. *See, e.g., Lone Star Steel Co. v. United States,* 10 CIT 731, 734, 650 F.Supp. 183, 186 (1986). Its approach was simply to cumulate "where the conditions of trade so warrant[ed]". *USX Corp. v. United States,* 11 CIT 82, 87, 655 F.Supp. 487, 491 (1987). Hence, where one nation's exports developed trends in the U.S. market that were distinct from the market patterns of other countries' competing exports, a decision not to cumulate was justified. *See, e.g., id.* But caselaw also established that the ITC could not engage in "a process of circular reasoning that renders cumulation a vestigial part of the causation analysis." *Id.,* 11 CIT at 88, 655 F.Supp. at 493. In other words, it was an abuse of discretion to rely on coincident reasoning in declining to cumulate while reaching a negative material-injury determination because cumulation is based on the proposition that unfair imports from one country, while not necessarily an independent cause of material injury, can contribute to such injury when viewed in combination with subject imports from other countries.

The Trade and Tariff Act of 1984, Pub. L. No. 98–573, §612(a)(2), 98 Stat. 2948, 3033 (Oct. 30, 1984), established a guideline for ITC cumulation in material-injury investigations, to wit, when subject imports compete with each other and with like products of the domestic industry in the U.S. market. This criterion was added in committee, replacing a requirement in the original bill that the imports have a contributing effect in causing, or threatening to cause, material injury. *See* H.R. Rep. No. 98–725, p. 37 (1984):

> * * * [C]umulation is based on the sound principle of preventing material injury which comes about by virtue of several simultaneous unfair acts or practices. The Committee amended the criteria to permit cumulation of imports from various countries that each account individually for a very small percentage of total market penetration, but when combined may cause material injury. The requirement in the bill as introduced that imports from each country have a "contributing effect" in causing material injury would have precluded cumulation in cases where the impact of imports from

[1] USITC Pub. 3247, pp. 29–31 (footnotes omitted). Imports from China, Brazil and Canada were covered by anti-dumping-duty orders, ergo the commissioner's references thereto.

> each source treated individually is minimal but the combined impact is injurious.

Although Congress continued to refine the standards for cumulation, the intent of the various provisions remained the same, namely, to address the fact that

> competition from unfairly traded imports from several countries simultaneously often has a hammering effect on the domestic industry. This hammering effect may not be adequately addressed if the impact of the imports are [*sic*] analyzed separately on the basis of their country of origin. The cumulation requirement is thus an effort to make the application of the injury analysis more realistic in terms of recognizing the actual effects of unfair import competition.

H.R. Rep. No. 100–40, part 1, at 130 (1987). Similarly, URAA recognized cumulation as "a critical component of U.S. antidumping and countervailing duty law", reiterating that "a domestic industry can be injured by a particular volume of imports and their effects regardless of whether those imports come from one source or many sources." H.R. Doc. No. 103–316, vol. I, at 847 (1994).

Although a sunset review may be a "brand new animal"[2], as the intervenor-defendants postulate, the statute and its legislative history nowhere suggest that the underlying purpose of cumulation has changed. That is, while

> the sunset inquiry is different from a present injury inquiry—asking whether injury is likely to continue or recur if an order is revoked rather than asking whether imports cause present injury or the threat thereof—the "hammering effect" or *likely* hammering effect of imports, whether from one source or many sources, is still the same. In an original investigation, the Commission cumulates imports to ensure that it addresses injury caused collectively by multiple import sources, even if those sources on an individual basis are not causing injury. In a sunset review, the Commission cumulates imports to ensure that it prevents the likely continuation or recurrence of injury caused by the revocation of orders against multiple import sources, even if revocation of an order against a single import source would not be likely to cause injury.

Plaintiffs' Reply Brief, p. 14 (emphasis in original).

Neither URAA nor its legislative history offers guidance as to the factors the ITC is to consider in exercising discretion to cumulate in sunset reviews. Since the underlying purpose of cumulation has not changed, however, caselaw covering discretionary cumulation is of moment. Most notably, the courts have considered it an abuse of discretion to engage in circular analysis, relying on the same factors for refusal to cumulate as for an ultimate negative injury determination. Such an approach thwarted congressional intent in that it demanded demonstrated, independent causation of material injury before any consideration of cu-

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[2] Defendants-Intervenors' Memorandum in Opposition, pp. 7, 8, 13, 23.

mulation. In *USX Corp. v. United States, supra,* for example, it was *not* the reliance on volume and price trends *per se* in considering cumulation that required remand, rather the problem was that the ITC had not sufficiently analyzed whether those differing trends reflected actual differences in the way that the imports affected the domestic market. There was at least a possibility that the differing trends therein had been caused by the initiation of the administrative proceedings themselves and ITA subsequent orders to suspend liquidation. However, as the court confirmed after remand, differing trends which reflect actual differences in the way imports from various countries affect the domestic market "alone may justify a decision not to cumulate". *USX Corp. v. United States,* 12 CIT at 205, 220–21, 682 F.Supp. 60, 74 (1988).

While the court did also find the ITC's initial analysis circular in part in *USX Corp.*, the finding was based on the agency's reference to lack of confirmed lost sales and revenue in the U.S. market as the basis for both declining to cumulate subject imports from Argentina and finding no material injury, *not* because of the comparison of volume and market-share trends. That is not to say that circularity can never be a problem where differences in volume, price and market share are at issue. The distinction is a narrow but important one, hinging on trends as opposed to absolutes. In one case upholding the ITC's refusal to cumulate based on differing volume and market-share trends, the court explained that, if the Commission

> majority had listed small volume or market share as its reason for not cumulating, the validity of the legal basis on which it rests its decision would be debatable. Here, however, rather than *just* absolute levels, numerous trends * * * reveal significant differences in the effects of Argentine and Spanish imports. * * * In this case, cumulation of data would obscure significant differences in trends. Prior to the effective date of the 1984 statutory amendment, ITC could consider this type of data in making its discretionary determination on cumulation.

Lone Star Steel Co. v. United States, 10 CIT at 735, 650 F.Supp. at 187 (emphasis added). Thus, while comparing trends inherently involves consideration of the underlying elements, that consideration itself does not make the analysis circular.

Similar reasoning has been followed with regard to discretionary cumulation in threat-of-material-injury cases:

> The court views cumulative analysis for threat purposes as feasible in certain circumstances. For example, if imports are increasing at similar rates in the same markets and have relatively similar margins of underselling, it is likely that cumulation could be undertaken. This does not mean that each country's imports need threaten injury by themselves. Separately, none of them might threaten injury. Whether cumulative analysis is actually feasible in various circumstances is left to the ITC to decide in other cases. Here, ITC found great disparity in the patterns of volume increases and decreases among imports from the various countries. The court does

> not read ITC's references to Colombian market share versus that of other countries as indicating application of an improper contributing effects test. Colombian exports were simply on a totally different plane from those of other countries in terms of market share, volume trends and otherwise. Finally, ITC notes that patterns of underselling, or lack thereof, varied greatly from one country to the next. Thus, price effects analysis on a cumulative basis would be difficult. * * *

Asociacion Colombiana de Exportadores de Flores v. United States, 12 CIT 1174, 1178, 704 F.Supp. 1068, 1072 (1988).

Under 19 U.S.C. §1675a, *supra,* the ITC is both given discretion to cumulate and required to consider whether material injury is likely to continue or recur in the event of revocation. In the likelihood determination, the agency must consider "the likely volume, price effect, and impact of the imports of the subject merchandise on the industry if the order is revoked", taking into account, among other things, its prior injury determination(s). Thus, by definition, the causation inquiry in sunset reviews will involve recalling the past in attempting to predict future trends.

While import trends will therefore play a role in both causation and cumulation analyses in sunset reviews, such trends are considered for different purposes, and, despite plaintiffs' arguments to the contrary, the problem of circularity is avoided. For example, in a discretionary cumulation inquiry, the ITC examines differences in current or likely volume or market-share trends between exporting countries, which would justify a decision not to exercise such discretion according to the aforementioned caselaw. However, in the likelihood determination, the ITC must then use trends to consider

> whether the likely volume of imports of the subject merchandise would be significant if the order is revoked or the suspended investigation is terminated, either in absolute terms or relative to production or consumption in the United States.

19 U.S.C. §1675a(a)(2).

The consideration of trends in re cumulation is not the equivalent of an injury analysis thereof. For example, in a case where exports from only one country are likely to exhibit increased volume and price effects in the event of revocation, but trends for imports from each of the other countries under an ITA order are likely to be negligible, the ITC would be justified in deciding not to cumulate imports from the first country with those from the others. However, cumulation of imports from the countries with relatively-small likely volume and price impact would not only be appropriate, a refusal to do so without some additional justification could constitute an abuse of discretion. Thus, a comparison of trends does not, as the plaintiffs assert, ask the ultimate, individual-country causation question as a predicate to cumulation "in a way that precludes consideration of this question on a cumulative basis".

(2)

In Commissioner Koplan's analysis, *supra,* there was likewise no preclusion of cumulation; there were simply no other countries from which subject imports had had, or were likely to have, volume and price trends similar to those of imports from India. In other words, Indian imports were on a different plane from those of the other countries in terms of likely trends in market share, volume, and price effects. *See, e.g.,* USITC Pub. 3247, Table I–7 and Fig. E–1. Thus, the court cannot and does not conclude that Commissioner Koplan's foregoing analysis amounted to an abuse of discretion or otherwise was not in accordance with law.

C

As recited above, 19 U.S.C §1675a(a)(7) precludes cumulation of the volume and effects of imports of the subject merchandise when the ITC determines that such imports are likely to have "no discernible adverse impact" on the domestic industry. Commissioner Askey concluded, as one of the ITC majority in this matter, that revocation of the order with respect to India would have no discernible adverse impact upon the U.S. industry. USITC Pub. 3247, p. 14. She appended a footnote expressing her individual views regarding the proper analysis of this issue:

> * * * [T]he language of section 752(a)(7) * * * clearly states that the [ITC] has the discretion to cumulate subject imports for purposes of its sunset analysis, as long as the statutory requirement of competition between the subject countries and the domestic like product is satisfied. Section 752(a)(7) also clearly states, however, that the [ITC] is *precluded* from exercising this discretion if the imports from a country subject to review are likely to have "no discernible adverse impact on the domestic industry" upon revocation of the order. * * * Thus, under this provision, the [ITC] must find that the subject imports from a country will have a "discernible adverse *impact on the domestic industry*" after revocation of the order before cumulating those imports with other subject imports. Accordingly, the [ITC]'s task under this provision is a straightforward one. To determine whether the Commission is precluded from cumulating subject imports from a particular country, the [ITC] must focus on how significantly the imports will impact the condition of the industry as a result of revocation, and not simply on whether there will be a small volume of imports after revocation, *i.e.,* by assessing their negligibility after revocation of the order. If the impact of the imports is not discernible, then the [ITC] is precluded from cumulating those imports with other subject imports. * * *

Id. at 10–11, n. 52 (emphasis in original, citation omitted). The plaintiffs object to this stated approach. First, they contend that the statute does not require imports to have *a* discernible adverse impact in order *to* cumulate and that requiring such a showing is materially different than requiring a showing of *no* discernible adverse impact in order *not to* cumulate. The court cannot, and therefore does not, concur.

When the ITC considers whether subject imports are likely to have no discernible adverse impact, the result of the inquiry will be either nega-

tive or affirmative. Logic and grammar indicate that a negative finding is that such imports will have a discernible adverse impact. Commissioner Askey's footnote merely breaks down the language of the requisite analysis into simple steps. Hence, an affirmative finding of discernible impact is only part of the answer to the question of whether cumulation is precluded. In other words, the first question is whether the imports are likely to have any such impact. If not, the ITC is precluded from cumulating. If yes, then the question remains whether that impact is also adverse. If affirmative, the agency is permitted to cumulate; if negative, cumulation is not permissible since any impact is not both discernible and adverse. In short, the court concludes that Commissioner Askey reasonably restated the standard for analysis, rather than changed it or "entirely dismantled the statute as written by Congress". Plaintiffs' Rule 56.2 Brief, p. 36.

Plaintiffs' second objection to the commissioner's analysis is that she

> considered as part of her cumulation analysis the critical question of whether *revocation* would have a discernible adverse impact on the U.S. industry * * * rather than whether the *imports under review* would have no discernible adverse impact.

Id. at 38 (emphasis in original). The court finds that that analysis, on its face, refutes such a claim. Most notably, Commissioner Askey joined the majority in stating that the nodiscernible-adverse-impact analysis "is focused on subject imports and the likely impact of those imports on the domestic industry within a reasonably foreseeable time if the order is revoked." USITC Pub. 3247, p. 10 (footnotes omitted). Moreover, her footnote 52, quoted above, does have references to the impact of "the imports" in the event of revocation. While Commissioner Askey has indeed considered such impact "upon" or "in the event of" revocation, this is clearly the proper context of the inquiry. As the defendant explains in its papers,

> the statute's reference to whether the imports "are *likely*" to have no discernible adverse impact on the domestic industry is clearly parallel to the ultimate question "whether revocation of the countervailing or antidumping duty order * * * would be likely to lead to continuation or recurrence of * * * material injury." Both, then, express the Congressional intent that the Commission is to focus on changes, if any, that *likely* will occur if revocation were to take place * * *.

Defendant International Trade Commission's Opposition, pp. 31–32 (emphasis in original). *Accord* Defendants-Intervenors' Memorandum in Opposition, p. 35. On its face, Commissioner Askey's analysis demonstrates that she was not analyzing the impact of revocation in general but of "the subject imports from a country * * * after revocation of the order before cumulating those imports with other subject imports." USITC Pub. 3247, p. 10, n. 52.

Finally, the plaintiffs assert that the commissioner's interpretation contradicts Congress's intent that the "no discernible adverse impact"

provision be limited to an analysis of import volume. Plaintiffs' Rule 56.2 Brief, p. 38. As the language of the statute and its legislative history show, that was not the intent of Congress. Presumably, if it had intended that the ITC consider only import volume in deciding whether cumulation was precluded, it would have so restricted its enactment. It did not. Congress chose "no discernible adverse impact", and *impact* in the context of U.S. unfair trade law, by any definition, encompasses more than volume of imports. The reason for this choice was reported as follows:

> * * * The Committee believes that it is appropriate to preclude cumulation where imports are likely to be negligible. However, the Committee does not believe that it is appropriate to adopt a strict numerical test for determining negligibility because of the extraordinary difficulty in projecting import volumes into the future with precision. Accordingly, the Committee believes that the "no discernible adverse impact" standard is appropriate in sunset reviews.

S. Rep. No. 103–412, p. 51 (1994).

The plaintiffs interpret this language to mean that no discernible adverse impact "is equivalent to negligibility, which, in turn, equates to import volumes." Plaintiffs' Rule 56.2 Brief, p. 39. The concept of negligibility arises from a previous statutory provision, 19 U.S.C. §1677(7)(C)(v), which was in effect prior to enactment of URAA. At that time, cumulation was mandatory in present-material-injury determinations for subject imports in competition with each other and with the domestic like product. Section 1677(7)(C)(v) granted the ITC discretion not to cumulate imports that it found to be "negligible" and having "no discernible adverse impact". Thus, the concept was originally applied as an exception to mandatory cumulation—a grant of discretion not to cumulate—whereas in sunset reviews the same principle now operates to preclude cumulation which would otherwise be discretionary.

The above-quoted URAA legislative history does analogize the no-discernible-adverse-impact standard to negligibility. However, in discussing this change in the law, the plaintiffs seem to overlook the fact that the 1994 Senate report distinguishes negligibility from import volumes in the context of sunset cumulation, rather than equating the two. It rejects "a strict numerical test" in order to avoid "the extraordinary difficulty in projecting import volumes into the future with precision". Again, even under the former statute, negligibility encompassed more than just import volumes. The ITC was required to evaluate "all relevant economic factors regarding the imports", including volume and market share, whether sales transactions involving the imports are isolated and sporadic, and price sensitivity of the domestic market. 19 U.S.C. §1677(7)(C)(v)(I)–(III) (1994). Thus, the court cannot concur in plaintiffs' assertion that negligibility equates only to import volume in this context. In the light of the sunset cumulation provision and its relevant legislative history, the court cannot hold that Commissioner Askey's interpretation was not in accordance with law.

D

The plaintiffs complain that Commissioner Crawford's analysis of cumulation lacked adequate explanation and was thus contrary to law.[3] Although her overall approach to cumulation may be unique[4], the commissioner recognizes that the "statute clearly prohibits cumulation where the subject imports are likely to have no discernible adverse impact on the domestic industry." USITC Pub. 3247, p. 42. As evidenced by a notation to the majority Views and her individual views, Commissioner Crawford stood with the majority in determining that revocation of the existing countervailing-duty order covering subject imports of heavy castings from India likely would have no discernible adverse impact on the domestic industry. *See id.* at 3, n. 2 and at 42–43. Consequently, she concluded that the statute precluded cumulation of the subject imports from India with those from the other countries. *See id.* at 43. Given that the commissioner clearly joined in section III.C.1. of the majority Views regarding no-discernible-adverse impact, the court does not consider the remainder of her individual analysis to be actionable, as the plaintiffs pray.

II

The plaintiffs take the position that, if the companion appeal from the ITA's sunset determination were to result in affirmative judicial relief, the court should remand this action to the ITC for consideration of the other agency's amended results.

Initially, the court agrees that there can be interrelation between the subsidy rates and the ITC's determination. Indeed, the statute provides that, in

> making a determination under section 1675(b) or (c) of this title, the Commission may consider the magnitude of the margin of dumping or the magnitude of the net countervailable subsidy.

19 U.S.C. §1675a(a)(6). And the commissioners, including those writing in dissent, exercised this discretion, noting that the ITA found that the likely countervailable subsidy upon revocation would range from 0.84 percent to 1.82 percent for imports from India. *See* USITC Pub. 3247, pp. 13, 29 and 38, n. 26.

Notwithstanding the relationship between the determinations of Commerce and the Commission, counsel for the latter assert that

> remand would not be appropriate even if the margins were to change as a result of the separate court action. The statute and

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[3] This claim was initially made in reference to the commissioner's analysis of India, China and Brazil. *See* Plaintiffs' Rule 56.2 Brief, p. 40. The court addresses the argument only as it relates to Indian subject imports, as the ITC's determinations regarding China and Brazil are not at issue in this matter. The other countries were purportedly included "to illustrate the totality of the shortcomings" in Commissioner Crawford's written explanation regarding cumulation, "not as an independent claim for relief." Plaintiffs' Reply Brief, p. 28.

[4] Commissioner Crawford describes her approach as a "sequential, four-step analytical process that addresses eligibility for cumulation, statutory prohibition, Commission discretion, and competition." USITC Pub. 3247, p. 41. The court notes a discrepancy in the cited result of her "eligibility" inquiry in this matter. *Compare id.* at 42 *with id.* at 13, n. 63. However, the court considers it to be harmless because the commissioner's steps are sequential, and the next one found that cumulation was precluded with regard to India. This conclusion mooted any issue raised by the discrepancy as to which countries' imports, if any, might have been cumulated with subject imports from India.

Statement of Administrative Action * * * accompanying the URAA make clear that, even in the context of the Commission's mandatory consideration of margins in the antidumping context * * *, the Commission is not to reconsider its determination if Commerce changes margins upon which the Commission has relied:

> For other investigations for which cumulation is appropriate, the Commission is to use the most recent dumping margin issued by Commerce at the time the Commission closes the record. This precludes challenges to a Commission determination on the basis that Commerce later modifies the original dumping margin.
>
> Changes in the original margin could occur due to further proceedings in staggered investigations, corrections of ministerial errors, reconsideration of a determination, or *judicial remand*. Absent this provision, Commission determinations could be subject to repeated requests for reconsideration or judicial remands. The finality of injury determinations would be seriously compromised if the Commission were required to amend or revisit its determination each time the administering authority revised its dumping margin.

H.Doc. No. 103–316 at 851 (1994) (emphasis added). * * * Although this SAA discussion relates only to cases in which the Commission has considered antidumping duty margins, there is every reason to view it as equally applicable when the margins relied on are countervailing duty margins. Whereas the Antidumping Agreement that resulted from the Uruguay Round of trade negotiations, and thus U.S. implementing law (19 U.S.C. §1677(35)) require consideration of the magnitude of dumping margins, the Subsidy Agreement from the Round, and thus U.S. implementing law, do not require the Commission to consider the rate of subsidization. * * * The discussion in the SAA therefore relates specifically only to dumping margins. * * * [T]here would be no rational basis to require a remand to the Commission when countervailing duty margins change by court remand, when such change in the very margins the Commission is required to consider, dumping margins, is not to be followed by a remand to the Commission.

Defendant International Trade Commission's Opposition, pp. 42–43 (citation omitted).

Be this reasoning as it may, the court is not at liberty to excuse automatically ITC reconsideration of subsidy rates developed during countervailing-duty sunset reviews pursuant to 19 U.S.C. §1675a[5]. That only

[5] *Cf.* 28 U.S.C. §2643(c)(1). In fact, while not in the context of a sunset review, the Court of International Trade and the Court of Appeals for the Federal Circuit have addressed the question of a remand to the ITC when dumping margins calculated by the ITA change. In *Borlem S.A.—Epreedimentos Industriais v. United States*, 13 CIT 535, 718 F.Supp. 41 (1989), *aff'd*, 913 F.2d 933 (Fed.Cir. 1990), for example, a recalculation of the dumping from the two respondent countries resulted in one margin's changing from approximately 20 percent to *de minimis* and thereby being excluded from the order *after* the ITC had issued an affirmative injury determination. The CIT directed the Commission on remand to reconsider its determination in light of that change, and the Federal Circuit affirmed the agency's authority to do so.

Subsequent cases have pointed out that the remand in *Borlem* was based on the fact that the change was "of such substantial significance that the ITC might well have changed its determination". *Nippon Steel Corp. v. United States*, 19 CIT 450, 467 (1995). They have sought to make clear that *Borlem* "does not stand for the broad proposition that ITC must reconsider a final determination based upon affirmative [dumping] margins that later change." *Id.* That is, the Commission need not reconsider its determination where it does not "appear the ITC made its finding of injury based upon material and significant inaccurate facts." *Saarstahl AG v. United States*, 18 CIT 595, 597, 858 F.Supp. 196, 198 (1994)(quoting *Borlem*, 13 CIT at 541, 718 F.Supp. at 46), *rev'd on other grounds*, 78 F.3d 1539 (Fed.Cir. 1996).

Congress can do. In any event, the results of this court's remand of related case No. 99–07–00441 to the ITA do not entail different rates, and they have now been affirmed by the court. *See Neenah Foundry Co. v. United States,* 25 CIT ____, ____ F.Supp.2d ____, Slip Op. 01–74 (June 20, 2001). Thus, plaintiffs' contingent claim for relief herein is now moot.

III

In view of the foregoing, plaintiffs' motion for judgment upon the agency record must be denied[6] and this action dismissed. Judgment will enter accordingly.

(Slip Op. 01–78)

3G MERMET FABRIC CORP, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 98–04–00669

(Dated June 26, 2001)

JUDGMENT

POGUE, *Judge:* This Court having received and reviewed the United States Customs Service results from the parties' voluntary remand of Flockè 11202 fabric, and Customs having complied with this Court's decision in *3G Mermet Fabric Corp. v. United States,* 25 CIT ____, Slip Op. 01–28 (March 13, 2001), in the absence of any argument in opposition thereto, it is hereby

ORDERED that the Remand Results filed by Customs are affirmed in their entirety.

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[6] Plaintiffs' Consent Motion for Oral Argument also can be denied, given the quality of their written submissions, as well as of the papers filed in opposition.

(Slip Op. 01–79)

FRONTIER INSURANCE CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 95–10–01383 and Court No. 01–00461 (severed entries)

[Plaintiff's motion for summary judgment denied; defendant's cross-motion for summary judgment granted in part.]

(Dated June 26, 2001)

Law Offices of Elon Pollack, P.C. (Elon A. Pollack and *Eugene P. Sands,* Esqs.) for plaintiff.

Stuart E. Schiffer, Acting Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Amy M. Rubin,* Esq.); *Edward N. Maurer,* Deputy Assistant Chief Counsel, International Trade Litigation, U.S. Customs Service, of counsel, for defendant.

OPINION AND ORDER

INTRODUCTION

WATSON, *Senior Judge:* This consolidated action[1] involves seventy-five entries of wearing apparel from El Salvador made by Offshore Sewing Industries ("Offshore") at the Port of Miami, Florida between September 1990 and January 1993. These entries were covered by a continuous bond issued by plaintiff, Frontier Insurance Company ("Frontier"), on August 9, 1990, as surety. The United States Customs Service ("Customs") claims that it provided Frontier with notices of an extension of the period for liquidation of the entries. Frontier, however, disputes it ever received such notices, and consequently, the entries must be "deemed liquidated" as provided in 19 U.S.C. §1504 at the entered value. Customs actually liquidated the subject entries on or after July 22, 1994 based on higher appraised values and demanded payment of increased duties from both Offshore and its surety, Frontier. Plaintiff filed protests against the foregoing liquidations. Customs denied the protests, plaintiff paid the increased duties, and then filed the summonses in this action. The court has jurisdiction under 28 U.S.C. § 1581(a).

The parties in this action have submitted cross-motions for summary judgment. The central issues on those motions are whether Customs sent extension notices to the surety and whether Frontier actually received such notices. Defendant claims, alternatively, with respect to thirty seven entries,[2] that even if the court finds as a fact that Frontier did not receive the extension notices Customs claims it sent to Frontier

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[1] The parties submitted cross-motions for summary judgment for Court Nos. 95–08–01099, 95–10–01383, and 95–08–01084. The parties, issues and merchandise being the same, the Court has *sua sponte* consolidated these actions into Consolidated Court No. 95–10–01383.

[2] These entries are: M86–0563822–9, M86–0565289–9, 189–0006398–5, 189–0006417–3, 189–0006419–9, 189–0006441–3, 189–0006442–1, 189–0006471–0, 189–0006512–1, 189–0006523–8, 189–0006536–0, 189–0006571–7, 189–0006575–8, 189–0006610–3, 189–0006611–1, 189–0006624–4, 189–0006628–5, 189–0006645–9, 189–0006682–2, 189–0006683–0, 189–0006684–8, 189–0006698–8, 189–0006805–9, 189–0006816–6, M86–0564838–4, M86–00564847–5, 189–0006312–6, 189–0006319–1, 189–0006327–4, 189–0006336–5, 189–0006342–3, 189–0006354–8, 189–0006355–5, 189–0006364–7, 189–0006368–8, 189–0006372–0, and 189–0006373–8.

prior to December 8, 1993, defendant is nonetheless entitled to partial summary judgment since, as a matter of law, Customs was not required by 19 U.S.C. §1504 to provide Frontier with extension notices prior to December 8, 1993.[3]

THE RECORD[4]

Between September 1990 and January 1993, Offshore imported wearing apparel from El Salvador, and made seventy-five separate entries at the port of Miami, Florida. These entries were made under a continuous bond issued by Frontier, as surety, on August 9, 1990. This bond secured payment of any duty, tax or charge due to the United States. Frontier renewed this bond on both August 10, 1991 and August 10, 1992, before it terminated on April 30, 1993. Customs liquidated all seventy-five entries on or after July 22, 1994 and within the 4 year period provided in 19 U.S.C. §1504.

Pursuant to 19 U.S.C. §1504, entries must be liquidated within one year, or the entries are deemed liquidated at the rate of duty and valuation entered by the importer. However, Customs may issue notices extending the liquidation period each year for a total of four years from the date the merchandise was entered. In the instant case, it is undisputed that Customs records show that it issued 173 extension notices addressed to Frontier's duly authorized agent, International Bond & Marine ("IB&M"), at 60 East 42nd Street, suite 1914. However, IB&M relocated from suite 1914 to suite 1620 at 60 East 42nd Street prior to the issuance of these notices.

The evidentiary record also contains the following:

1. Customs has submitted both a letter from plaintiff to Mr. Ronald Busch, Operating Accountant of Customs' Debt Collection Unit at the National Finance Center requesting Customs to mail the monthly printout of increased duty claims to IB&M, as agent for Frontier, at 60 East 42nd Street, and a printout from Customs' surety file reflecting a change of Frontier's address from 196 Broadway, Monticello, N.Y. to IB&M at 60 East 42nd Street, suite 1914, New York, N.Y. The foregoing letter and printout are attached to a declaration executed by Ms. Sue Yeager, a Customs official identified below.

2. As noted above, IB&M moved its office from suite 1914 to suite 1620 at 60 East 42nd Street in November 1989. According to a deposition and declaration of Ms. Lynn Hirrel, an employee of IB&M, she communicated with Mr. Busch twice to notify Customs that IB&M and Frontier had relocated to suite 1620. However, according to Mr. Busch's declaration, he has no recollection of any communication or discussion with Hirrel about changing the mailing address for IB&M from suite 1914 to suite 1620.

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[3] 19 U.S.C. §1504, as amended by section 641 of Title VI (Customs Modernization) of the North American Free Trade Agreements Implementation Act ("Mod Act"), Pub. L. 103–182, §641, 107 Stat. 2204, became effective on December 8, 1993. Section 641 amended §1504 by requiring Customs to provide sureties with notices of an extension of liquidation.

[4] The record on the motions before the court is comprised of various declarations, deposition excerpts, and official entry documents.

3. From a declaration executed by Ms. Yeager, a Lead Accounting Technician of the Billings Team of the Accounts Receivable Branch of Customs Accounting Services Division ("Billings Team"), it appears that Customs maintains in its computer system, the Automated Commercial System ("ACS"), records of the mailing address for each surety authorized to issue customs bonds. Continuing, Yeager states that to ensure accuracy, the authority to change a surety's mailing address is vested in only a small subgroup of the Billings Team; that the Billings Team retains a paper copy of any correspondence or notes in a surety action file; that the ACS and the surety action file reflect a letter request for a change of address by plaintiff to change Frontier's address from its Monticello location to IB&M's location at 60 East 42nd Street, suite 1914 and that there was a prompt change of address in the ACS.

4. Plaintiff has submitted a declaration of its legal counsel in this case, Elon Pollack, Esq., which in turn has attached two other declarations of Customs officials, Arthur Versich and Roger Odom. According to the declarations of these Customs officials, Customs does not retain a hard copy of individual extension notices *per se*, but written extension notices are mailed within a day of their printing each week; and Customs retains a printout of its computer records which list when and to what address notices of extension are sent. Customs' computer printout covering the entries at issue, which is attached to an additional declaration of Mr. Versich submitted by defendant, shows that from 1991 to 1994, the extension notices were mailed to suite 1914.

5. In her deposition, Hirrel testified that between 1991 and 1994, each day when the mail arrived, she would sort the mail into piles, open the checks and give them to the person responsible for posting them, and segregate the suspension/extension notices into ports and file them in the boxes for each port. Moreover, Hirrel stated that when she searched the boxes for the notices at issue, she only found three: those for entries M86–0564408–6, M86–0564833–5, and M86–056529–9. She also stated in her deposition, that even after the move to suite 1620, she received mail addressed to suite 1914; sometimes an employee of the new occupant of suite 1914, a client of IB&M, would bring mail addressed to IB&M at suite 1914, if that person had received any, to suite 1620.

6. Yeager's declaration and attachment indicate that Customs' surety file contains a note written by an unidentified person to an unidentified person concerning change of address, ostensibly of Frontier, to conform with the latter's address listed in the Federal Register, and a computer printout showing a change of address for plaintiff on April 24, 1991 from 60 East 42nd Street, suite 1914 to its Monticello location. The surety file also contains a note, dated May 23, 1991, reflecting a conversation between Yeager and Mr. Ruhuler from Frontier's Monticello Office requesting that plaintiff's address be changed from Monticello back to 60 East 42 Street. Yeager also states that she recalls reviewing IB&M's address at 60 East 42nd Street with Ruhuler and confirming the suite number as 1914.

7. In 1992 and 1993, IB&M and Customs exchanged letters, submitted by plaintiff, concerning billing and payment issues. IB&M's letterhead on these letters indicates an address of 60 East 42nd Street, suite 1620 and Customs addressed its reply letters to IB&M at suite 1620.

8. In his declaration, Busch states that he does not recall being notified of anything between July 22, 1989 and August 24, 1994 regarding an address change for Frontier or IB&M. Busch also stated that he corresponded with Frontier through IB&M at the latter's address at suite 1620; and that he had no reason to compare the address he was using for the letter (suite 1620) and the address stored in the ACS. Busch further stated that while he was a contact point for change-of-address inquiries by Frontier, he did not have responsibility for maintaining the surety address records or authority to change the records. Further, Busch stated that in the absence of Frontier or IB&M actually making a change of address request, he had no reason to question whether the suite number he addressed his letters to was different from the ACS record, or to question whether suite 1620 represented a change of address or simply an additional office on another floor in the same building. Additionally, Yeager stated in her declaration that plaintiff's letters to Customs concerning billing reflecting an address of 60 East 42nd Street, suite 1620, do not request a change of address; that the letters Customs wrote back were not generated from ACS; and that for all Customs knew, IB&M might have had offices on two floors at 60 East 42nd Street.

9. The surety file, attached to Yeager's declaration, contains a letter dated August 26, 1994 from Mr. Tattum, President of IB&M, instructing Customs to change IB&M's address to Hoboken, N.J.

10. A declaration executed by Tattum states that a change of address was filed with the Post Office in or about November 1989, to reflect the move from suite 1914 to suite 1620. However, Eileen Downing, a Supervisory Entry Specialist with Customs in the Entry Branch in Miami, states in a declaration that Customs Form 4333A (Notice) contains a return address for the port the merchandise was entered. For notices relating to Miami, the return address is a post office box which routes the mail to the Miami Entry Branch. Downing also states that she does not recall ever seeing a notice to a surety company among the returned mail. Additionally, she states that she was not aware of any notices addressed to suite 1914 that had been returned to the Entry Branch, and that the Entry Branch corrects errors to returned notices to ensure that future notices are properly addressed and re-addresses and re-mails the returned notices so they can reach the intended recipient.

PLAINTIFF'S CONTENTIONS

Plaintiff first contends that under both 19 U.S.C. §1504 and 19 C.F.R. §159.12, at all relevant times in this case, Customs was required to provide a surety with notice of an extension or suspension of liquidation. In support, plaintiff suggests that this court's interpretation of 19 U.S.C. §1504 in *Old Republic Ins. Co. v. United States,* 10 CIT 589 (1986) *("Old*

Republic"), has been rejected by the Court of Appeals for the Federal Circuit. Second, plaintiff argues that the Government may not avail itself of the presumptions of regularity and delivery of the notices, which *inter alia,* subsume that the notices were correctly addressed if sent through the mail. Thus, plaintiff argues that there is no dispute it changed its suite within its office building, Customs was notified of the change of address (suite number), and Customs nonetheless persisted in sending the notices to its former incorrect suite number. Consequently, plaintiff insists that the Government is entitled to neither the presumption of regularity nor of delivery. Plaintiff further contends that even assuming *arguendo* that the Government may rely on those presumptions, they are rebutted by plaintiff's undisputed evidence of IB&M's strict routine for receiving and processing mail, and non-receipt of the notices. Plaintiff, therefore, requests that the court grant its motion for summary judgment and hold that its entries must be deemed liquidated at the entered value under 19 U.S.C. §1504.

DEFENDANT'S CONTENTIONS

Defendant contends that prior to the effective date of the Mod Act, December 8, 1993, Customs was not required by 19 U.S.C. §1504 to provide notice of an extension to sureties. Moreover, the Government relies on this court's holding in *Old Republic* that prior to the Mod Act, Customs was not required to provide notices of an extension to a surety notwithstanding its regulations provided for such notice. Furthermore, the Government insists there is no dispute that plaintiff never requested a change of address for notices, that Customs mailed the 173 notices to the mailing address plaintiff requested, that the tenant in suite 1914 occasionally brought mail addressed to plaintiff to its new suite, 1620, and that no notices were ever returned to Customs by the Post Office. The Government requests summary judgment dismissing this action, or in the alternative, partial summary judgment for the thirty-seven entries for the reasons stated previously.

DISCUSSION

STANDARD OF REVIEW

Under USCIT Rule 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). When a party moves for summary judgment, it bears the burden of demonstrating the absence of any genuine issues of material fact. *Avia Group Int'l, Inc. v. L.A. Gear California, Inc.,* 853 F.2d 1557, 1560 (Fed. Cir. 1988). However, it remains a function of the court to "determine whether there are factual issues that are material to resolution of the action. The court may not resolve or try factual issues on a motion for summary judgment." *Sea-Land Service, Inc. v. United States,* 69 F.

Supp. 2d 1371, 1375 (CIT 1999) (quoting *Phone-Mate, Inc. v. United States*, 12 CIT 575, 577, 690 F. Supp. 1048, 1050).

The parties have submitted cross-motions for summary judgment presenting the court with two questions. First, whether prior to the effective date of the Mod Act, December 8, 1993, 19 U.S.C. §1504 and 19 C.F.R. § 159.12 required Customs to give notice to a surety of an extension of liquidation. This question, of course, is purely a matter of law, and thus appropriate for the Court to resolve on the cross-motions for summary judgment. The second question is whether, to the extent if any, that Customs was required to give notice of extension to the surety such notice of extension in fact was given in this case.

19 U.S.C. §1504

At the outset, the court notes that there is no dispute in this case that following the effective date of the Mod Act, December 8, 1993, Customs was required to give notice of an extension of liquidation to both the importer and the surety pursuant to 19 U.S.C. § 1504(b). Plaintiff contends, however, that even prior to December 8, 1993, 19 U.S.C. §1504 and 19 C.F.R. §159.12 required Customs to provide both importers and sureties with notices of an extension of liquidation, and that in this case Customs failed to provide such notices to Frontier. In support of that argument, plaintiff asserts that this court's interpretation of §1504 in *Old Republic* was incorrect, citing two recent decisions of the Court of Appeals for the Federal Circuit, addressed *infra*. Thus, plaintiff claims that this court should grant its motion for summary judgment for all seventy-five entries because Customs did not give it notice of an extension of liquidation as required by law, and therefore, those entries were deemed liquidated as entered.

The Government, citing *Old Republic,* contends that prior to the Mod Act amendments, 19 U.S.C. §1504 required Customs to provide notice of an extension to importers, but not to sureties, and that the decisions of the Federal Circuit relied on by plaintiff did not disturb the holding in *Old Republic,* which remains controlling law. Thus, the Government argues that based on *Old Republic,* this court as a matter of law should at least grant partial summary judgment on thirty-seven entries liquidated within the one-year extension of liquidation issued prior to the Mod Act amendments to §1504, irrespective of whether plaintiff received notices of extension (since such notices were not required pre-Mod Act).[5]

Prior to the Mod Act, §1504 provided, in pertinent parts:

> (a) Liquidation. Except as provided in subsection (b), an entry of merchandise not liquidated within one year from:
>
> (1) the date of entry of such merchandise * * * shall be deemed liquidated at the rate of duty, value, quantity, and

[5] By contrast, the other thirty-eight entries before the court were liquidated within one-year extensions issued on or after the effective date of the Mod Act amendments. Thus, with respect to those entries, there is no dispute that the statute required that notice be given to a surety, and the only issue in this case is factual—whether such notices were given.

amount of duties asserted at the time of entry by the importer of record. * * *

(b) Extension. The Secretary may extend the period in which to liquidate an entry by giving notice of such extension to the importer of record in such form and manner as the Secretary shall prescribe in regulations, if—

(1) information needed for the proper appraisement or classification of the merchandise is not available to the appropriate customs officer;

(2) liquidation is suspended as required by statute or court order; or

(3) the importer of record requests such extension and shows good cause therefor.

(c) Notice of Suspension. If the liquidation of an entry is suspended, the Secretary shall, by regulation, require that notice of such suspension be provided to the importer of record concerned and to any authorized agent and surety of such importer of record. * * *

19 U.S.C. §1504 (emphasis added).

When Customs promulgated its pre-Mod Act regulations under §1504, it provided that the district director "promptly shall **notify** the importer or the consignee and his agent and **surety** on Customs Form 4333–A, appropriately modified, that the **time has been extended** and the reasons for doing so." 19 C.F.R. §159.12 (1990) (emphasis added.). Thus, prior to the Mod Act amendment, the regulation contained an additional requirement not provided for by statute, that is, providing a surety with notice of an extension of liquidation.

The court, in *Old Republic,* was confronted with a situation where Customs did not provide the surety, Old Republic, with notices of an extension of liquidation pursuant to 19 C.F.R. §159.12. Plaintiff, in that case, contended that because Customs did not provide notice pursuant to its regulations, its entries should be deemed liquidated under §1504. *Old Republic,* 10 CIT at 589. The Government, on the other hand, contended that in enacting §1504 in 1978, Congress intended sureties to be excluded from the notice requirement for extensions. *Id.* at 594–95. The court, after evaluating the legislative history, statutory construction of §1504 (b) and (c), and a subsequent Congressional amendment, held that Congress intentionally omitted sureties from those who were entitled to notices of extension. *Id.* at 595–96. Thus, the court concluded that "in order to be consistent with the statute, the customs regulation cannot be read to effect a deemed liquidation in this case." *Id.*

As mentioned *supra,* plaintiff contends that the above rationale in *Old Republic* was rejected by the Federal Circuit in two cases: *St. Paul Fire & Marine Ins. v. United States,* 6 F.3d 763 (Fed. Cir. 1993) *("St. Paul")* and *Intercargo Ins. Co. v. United States,* 83 F.3d 391 (Fed. Cir. 1996) *("Intercargo").* For its proposition that Congress intended Cus-

toms to provide sureties with notices of an extension, plaintiff cites the Court of Appeals statement in *St. Paul:*

> [B]efore 1978, "Customs could delay liquidation as long as it pleased, with or without notice." *International Cargo & Surety Ins. Co. v. United States,* 15 CIT 541, 543, 779 F. Supp. 174, (Ct. Int'l Trade 1991) Section 1504 consequently serves to "increase certainty in the customs process for importers, surety companies, and other third parties with a potential liability relating to a customs transaction." S. Rep. 778, 95th Cong., 2d Sess. 32 (1978).

St. Paul, 6 F.3d at 767; *see also Intercargo,* 83 F.3d at 396.

While the Court of Appeals articulated the above as the rationale for §1504, it did not mention *extensions* of liquidation (as opposed to suspensions), the inconsistency between 19 U.S.C. §1504 and 19 C.F.R. §159.12, or whether §1504 required Customs to provide a surety with notices of an extension of liquidation. Moreover, this court in *Old Republic* acknowledged this same rationale for enacting §1504, but determined that

> [w]hile these considerations are consistent with the desire to provide sureties with notice of extension of the time for liquidation, Congress failed to require such notice to them in section 1504(b), as a prerequisite to extension while explicitly requiring a notice to sureties in section 1504(c), if a suspension of liquidation has occurred. Since the provisions are part of the same statutory schemes regarding the liquidation of entries, the court can only assume Congress was aware of the fact that it was omitting sureties from the list of parties to whom notice of extension must be given before the extension is effective.

Old Republic, 645 F. Supp. at 596. Nothing in *St. Paul* or *Intercargo* indicates this analysis is incorrect.

Additionally, this court in *Hanover Ins. Co. v. United States,* No. 94–07–00438, slip op. 01–57 (CIT Dec. May 16, 2001) *("Hanover"),* recently relied on *Old Republic* in determining that §1504 (c) required Customs to provide a surety with notice of suspension. *Hanover,* slip. op. at 17. In its analysis of §1504, the court reviewed the statute and relevant legislative history, acknowledged that Congress provided for different treatment of sureties under §1504 (b) and (c), and concluded that "subsection (a), (b), and (c) [of §1504], read together are not perfectly 'coherent and consistent', and the intent of Congress cannot be gleaned solely from their erstwhile words." *Id* at 14. Thus, the court agreed with *Old Republic,* that prior to the Mod Act, §1504 required notice to the surety for *suspension* of liquidation, but not for notice of *extensions* of liquidation. *Id.* at 16.

Finally, while "the court should not place too high a value on the views of one Congress as to the construction of a statute enacted by another Congress, * * * the views of a subsequent Congress may be given some consideration in interpreting relevant Congressional intent." *Old Re-*

public, 10 CIT at 595. Despite an earlier amendment[6] to §1504, Congress did not harmonize the notice requirements under §1504 (b) and (c) with respect to sureties until the Mod Act. Moreover, in considering the Mod Act, Congress recognized:

> With regard to notification of sureties, the bill corrects an omission in existing law and codifies existing administrative practice. Presently, Customs is only required to provide notice of an extension of liquidation of an entry to sureties when liquidation is suspended by statute of court order. **The statute does not require notice to be sent to the surety when liquidation is extended** because Customs requires more information or when the importer requests an extension. **The bill will now require notification of sureties in all three instance.**

H.R. Rep. No. 103–361, pt. 1, p 139 (1994) (emphasis added); *see also Hanover*, slip. op. at 16. Thus, it is readily apparent that prior to the Mod Act amendment, Congress did not require Customs to provide sureties with notices of an extension of liquidation. Therefore, the court agrees with the Government that *Old Republic* is controlling law.

For all the foregoing reasons, the court grants the Government's alternative motion for partial summary judgment on the thirty-seven entries liquidated within the one-year extensions of liquidation issued prior to the Mod Act amendments to §1504, whether or not plaintiff received notices of extension. Further, this court severs these entries from Consolidated Court No. 95–10–01383, designates them to be covered by Court No. 01–00461, and dismisses that action.

Receipt of Notices of an Extension of Liquidation

Plaintiff contends that it is entitled to summary judgment based on the issue of whether notices of extension of liquidation were given by Customs. According to plaintiff, notices were improperly addressed and not received by plaintiff. Moreover, plaintiff posits that Customs is not entitled to the presumptions of regularity and delivery because it mailed the notices of an extension to the incorrect address.

The Government contends that it is entitled to summary judgment as to the issue of notice. Hence, the Government insists that since Customs mailed the notices to the address specified by plaintiff, it is entitled to the presumptions of regularity and delivery. Moreover, the Government claims that, in any event, plaintiff actually received the notices because none of the notices were ever returned by the Post Office to Customs' Entry Branch at the Port of Miami.

Based solely on the contentions of the parties, it would appear that there may be genuine issues of material fact respecting the issue of giving and receiving extension notices. Fundamentally, of course, bald assertions of fact by the parties in their briefs without adducing any evidence are insufficient to create genuine issues of material fact. *See T&M*

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[6] Section 191 of Subtitle D, Technical Amendments, Trade and Tariff Act of 1984, Pub. L. 98–573, 98 Stat. 2971, October 30, 1984 amended 19 U.S.C. §1504 by replacing "the importer, his consignee, or agent" to read "importer of record."

Distributors, Inc. v. United States, 185 F.3d 1279, 1285 (Fed. Cir. 1999). However, a careful analysis of the evidence adduced by the parties leads this court to conclude there are genuine issues of material fact concerning the giving and receiving of the extension notices for thirty-eight entries.

Customs officers like other Government officials are entitled to a rebuttable presumption of "regularity," *i.e.,* their duties are performed in the manner required by law. *International Cargo & Sur. Ins. Co. v. United States,* 15 CIT 541, 544 (1991). Here, the Government relies upon both the presumption of regularity, specifically that notice was given in accordance with statutory and regulatory requirements, and the presumption of delivery. In other words, "a letter properly directed that is placed in the mail or delivered to a postal carrier is presumed to have reached its destination and to have been received by the person to whom it was addressed. * * * Thus, the onus upon the Government is to establish proper mailing of requisite notices; it then falls to the plaintiff to establish nonreceipt [sic] ." *A.N. Deringer, Inc. v. United States,* 20 CIT 978, 993 (1996)(internal citations omitted); *see also Hanover, supra.*

Here, while the Government does not have direct proof that the notices of an extension were actually mailed, it has submitted the declaration of Arthur Versich, to establish that while Customs does not retain a hard copy of the notices, they are regularly mailed within a day of printing each week and Customs retains a printout indicating when and to what address notices of extension are mailed. Customs' printout for the entries at issue, unrebutted by any evidence submitted by plaintiff, demonstrate that between 1991 and 1994, notices were mailed to IB&M at 60 East 42nd Street, suite 1914. Thus, the Government is entitled to the presumptions of regularity and delivery if Customs mailed the notices to the *correct address.* However, plaintiff asserts and has adduced evidence that it contends shows Customs mailed the notices of extension to the wrong address. As support, plaintiff has proffered both the declaration of Ms. Hirrel, an employee of IB&M, and excerpts from her deposition stating that she notified Customs in 1989 that IB&M moved to suite 1620. Plaintiff has also submitted letters it exchanged with Customs regarding billing matters, where Customs addressed the response letters to plaintiff at suite 1620.

In response, the Government has proffered an unrebutted declaration from Ms. Yeager stating that in 1992, plaintiff's address was inexplicably changed in the ACS to reflect the plaintiff's Monticello address, that Mr. Ruhuler from Frontier's Monticello Office contacted her to request the surety's address be changed from Monticello back to 60 East 42nd Street, and that she reviewed IB&M's address with Mr. Ruhuler, confirming suite number 1914. Ms. Yeager also stated that plaintiff's letters to Customs regarding billing claims showing an address of 60 East 42nd Street, suite 1620, do not request a change of address, that Customs' response letters were not generated from ACS, and that for all Customs knew, IB&M might have had offices on two floors at 60 East

42nd Street. Furthermore, Mr. Busch maintains that there was no reason for him to compare the address he used to respond to plaintiff's billing claims (suite 1620) and the address stored in the ACS, and that he did not have responsibility for maintaining the surety address records or authority to change the records. In the absence of plaintiff requesting a change of address, Busch claims he had no reason to question whether the suite number he used to address his letters was different from the ACS record, and if so, whether suite 1620 represented a change of address or simply an additional office on another floor. In sum, as to plaintiff's correct mailing address, the parties' evidence as presented above is squarely in conflict, and therefore, there is a factual issue that must first be resolved bearing on whether the Government is entitled to the presumption of regularity and delivery.

Even if the Government is entitled to the presumptions of regularity and delivery, these presumptions are rebuttable by proof of non-receipt. *Deringer,* 20 CIT at 986. As to the issue of non-receipt, plaintiff again relies on statements from Ms. Hirrel. Ms. Hirrel stated that between 1991 and 1994, each day when the mail arrived, she would sort the mail into piles, segregate the suspension/extension notices into ports, and then file the notices in the boxes for each port. Moreover, Ms. Hirrel stated that when she searched the boxes for the notices at issue, she only found three. Plaintiff has also submitted the declaration of Kevin Tattum, President of IB&M, in which he states that a change of address form was filed with the Post Office in or about November 1989, to reflect the move from suite 1914 to suite 1620, apparently inferring that the Post Office would have forwarded notices to the new address.

Seeking to rebut the foregoing evidence of plaintiff, and thus to prove that plaintiff actually received the notices, the Government points both to Ms. Hirrel's statement that occasionally when mail was sent to suite 1914, an employee of the new occupant, a client of IB&M, would bring the mail to IB&M, and to the declaration of Eileen Downing, a Supervisory Entry Specialist with Customs in the Entry Branch in Miami. Ms. Downing states that Customs Form 4333A (Notice of an Extension) contains a return address for the port at which the merchandise was entered. For notices relating to Miami, the return address is a post office box which routes the mail to the Miami Entry Branch, where they correct the underlying errors to the returned notices so future notices are properly addressed, and then re-address and re-mail the returned notices so they can reach the intended recipient. Downing states that she does not recall ever seeing a notice to a surety company among the returned mail. Additionally, she states that she was not aware of any notices that had been returned to the Entry Branch which were addressed to suite 1914.

It is clear from the court's careful review of the evidence of record that the parties dispute both whether the notices were properly addressed (which goes to the presumptions of regularity and delivery), and whether the notices were nonetheless actually received by plaintiff (which

goes to the question of whether the presumptions were rebutted). The short of the matter is the court finds triable issues of material fact respecting thirty-eight entries which this court may not resolve by summary judgment. Accordingly, the court denies the cross-motions for summary judgment with respect to the remaining thirty-eight entries.

CONCLUSION

This court finds, as a matter of law, that 19 U.S.C. §1504 did not require Customs to provide sureties with notices of an extension of liquidation prior to the Mod Act. Thus, the court grants the Government's alternative motion for partial summary judgment on the thirty-seven entries that were liquidated pursuant to extensions of time effected prior to the Mod Act, and for which entries, the issue of notice to the surety is immaterial. These entries are severed from Consolidated Court No. 95–10–01383 and designated to be covered by a new number, Court No. 01–00461. The latter action is hereby dismissed.

As for the remaining thirty-eight entries, where there is no dispute between the parties that extensions of liquidation effected by Customs on and after December 8, 1993 required notices to the surety under 19 U.S.C. § 1504(b), the court finds triable issues of material fact, as discussed above. Therefore, because of the triable issues of fact, the parties cross-motions for summary judgment with respect to the thirty-eight remaining entries are hereby denied.

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